Supreme Court, U.S.
FILED
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No. 09-____

In the Supreme Court of the United States

ROBERT WELCH, WARDEN,
Petitioner,

v.

JOHN C. MOORE, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

No. 07-3380

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN C. MOORE, JR.,
Petitioner-Appellee,

v.

JAMES S. HAVILAND, Warden
Respondent-Appellant,

Filed: December 17, 2008

Before: BOGGS, Chief Judge; ROGERS, Circuit Judge; and SHADUR,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Rogers would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
s/Leonard Green
Clerk

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 08a0253p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN C. MOORE, JR.,
Petitioner-Appellee,

v.

JAMES S. HAVILAND, Warden,
Respondent-Appellant.

No. 07-3380

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 04-00242—Lesley Brooks Wells, District Judge.

Argued: March 18, 2008

Decided and Filed: July 15, 2008

Before: BOGGS, Chief Judge; ROGERS, Circuit Judge; SHADUR, District Judge.*

---

* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

COUNSEL

ARGUED: Jerri L. Fosnaught, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellant. J. Dean Carro, UNIVERSITY OF AKRON SCHOOL OF LAW, Akron, Ohio, for Appellee. **ON BRIEF:** Jerri L. Fosnaught, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellant. J. Dean Carro, UNIVERSITY OF AKRON SCHOOL OF LAW, Akron, Ohio, for Appellee.

SHADUR, D. J., delivered the opinion of the court, in which BOGGS, C. J., joined. ROGERS, J. (pp. 12-13), delivered a separate dissenting opinion.

OPINION

SHADUR, District Judge. James Haviland, in his capacity as Warden, appeals the issuance of a writ of habeas corpus to John Moore ("Moore") by the district court. In the underlying state criminal proceedings that have given rise to Moore's federal habeas action, he sought to represent himself at trial, but his request was never resolved and he was convicted while represented by appointed counsel. After his conviction was upheld on appeal in the state system, he then turned to the federal courts and was awarded a grant of conditional habeas relief. We affirm the judgment of the district court that did so.

I. Moore's State Criminal Trial[1]

Moore's criminal trial took place in Cuyahoga County Common Pleas Court in September 2000. On the third day of trial Moore's appointed attorney Robert Tobik ("Tobik") informed the trial judge that Moore was displeased with some aspects of his representation and wanted to address the court. Moore had given Tobik a note for the judge expressing that displeasure, but the note was not delivered. Moore then attempted to speak to the judge in open court, but the judge told him that he was not to engage in conversation with the court in front of the jury. Later, when the jury was on break, the following exchange occurred:

> The Court: What's the problem that you can't communicate to the court through your attorney?
>
> Moore: Your Honor, I would like to go on the record to preserve the right to call all witnesses called by the prosecutor. I have many, many questions.
>
> The Court: That's fine. You can call anybody you want.

---

[1] It is unnecessary to recount the specifics of Moore's alleged crimes, for the grant or denial of habeas relief depends solely on occurrences during trial. Appellant's counsel have devoted an inordinate amount of space in their briefs to spell out (in considerable detail) Moore's alleged crimes. We scarcely need to remind lawyers who represent the government at any level that even the meanest members of society also have constitutional rights.

Moore: I have many questions that I presented to my lawyer to be asked that he did not ask them. Also, I want Fred King and all the codefendants called and put on record whether they take the Fifth or if they--

The Court: You call anybody you want. That's fine.

Moore: Okay. Also, I asked him to have Detective Moran kept out of the room while Detective Maruniak testified because I'm sure there would be inconsistencies between what he was telling us and what I was expecting to get out of Detective Moran.

The Court: There is a motion for separation of witnesses. Anybody who wanted to call a witness here could have the individual subpoenaed and/or announced that they were going to be called and taken out of the courtroom. They leave the courtroom.

Moore: That's my point. Before he got started this morning--see, I noticed in the last one he sat through from beginning to end of Detective Alexander's testimony. From beginning to end Detective Maruniak was present. So, I asked my attorney to make sure that Moran was not present.

The Court: Are you disagreeing with your attorney's tactics?

Moore: I wrote it in a letter to you to make sure you could get it down even if he didn't.

The Court: I haven't seen your letter.

Moore: I know. That was my point. I knew for a fact you hadn't seen it before he--

The Court: You know, look. You have a very experienced trial counsel.

Moore: I understand that, but I feel that--

The Court: Hold it. When I'm talking, you don't interrupt me.

Moore: I'm sorry.

The Court: He can decide what questions are appropriate and what are not. Not you. You can make suggestions to him. You can urge him to ask questions, but if the question isn't permissible under the rules of evidence or if the question goes into sound tactics of his assessment of the case and what tactics he thinks should be employed, then he is the one who makes that decision as to the specifics of the questions and witnesses. He may have other witnesses in mind to ask the questions or areas to which you are concerned about.

Moore: My question is this, then what do I have to do to retain or to get my right to make a decision on what questions are asked and who's called and not called? What do I have to do right now to do that because I feel that I have some very important questions that are not being asked.

The Court: First of all, you could have hired your own attorney. This attorney has been appointed by the court, by another judge, whoever handled your arraignment. Now, the

court appointed in this case an attorney who's handled murder cases, high level cases, felony one cases with great success, who understands the law and is highly respected in the community. Now, you could have hired your own attorney or you can go pro se and be your own attorney, which is of course a very dubious action for anybody to take, and I personally, in 28 years as an officer of the court, have never seen anybody successful in that regard. In fact, I don't even know of a case in the common pleas Cuyahoga County where someone has been successful at a trial acting as their own attorney pro se. But you always have that option.

Moore: So you are saying that's the only way that I can get all my questions--

The Court: The dream team is occupied here. We can--

Moore: Can I go pro se?

The Court: --get Johnnie Cochran or F. Lee Bailey.

Moore: Can I go pro se then?

The Court: You want to go at this point--

Moore: You are leaving me with no other option. You are saying that the only way--

The Court: It is too late for that now. You have already started with an attorney. I don't believe you can go mid trial.

Moore: That's what I'm asking. I asked you what do I have to do.

The Court: I don't think you are in a position to discharge your attorney. You haven't demonstrated any knowledge of the law or willingness to comply with the orders of the court or understanding of the rules of evidence.

Moore: I've tried to get--

The Court: And basic politeness. I will entertain that thought. If you want to put it in writing over the lunch hour, I will instruct the deputies to allow you to have your paper and pencil or pen and allow you to make a written motion if you want to do so over this lunch period and explain to me your plans for trial, your strategy and -- not specific, but your general capability of conducting a trial. I don't see any right now. You would not be in a position to conduct the final argument.

Moore: Can I ask you a question?

The Court: You would be waving [sic] final argument because you would be incapable of presenting what a pro se final argument would have to be. It would be, you know, a very dubious action. Again, I have never seen it happen. It's theoretically possible it could happen where it could be successful. It's theoretically possible that you could. It's possible that you can be hit by a meteor.

Moore: A what?

> The Court: A meteor, right? Things that come from space and they invade the earth's atmosphere and they hit the earth on a day-by-day basis. I'm told. I have never seen one, though. Not striking anyhow.
>
> Moore: All I'm asking is for a right to call them witnesses.
>
> The Court: You should discuss that with your attorney.
>
> Moore: And ask the questions, and I'm asking you--
>
> The Court: You should discuss that with your attorney.
>
> Moore: I have over time and time again, but witnesses keep coming and going and the questions that I need asked are not getting asked.

At that point the court then instructed Tobik to proceed. Tobik then made a motion for separation of witnesses and for the exclusion of Detective Moran from the courtroom. After the court granted the motion, this brief colloquy ensued:

> The Court: Okay. All right. We got to handle the other case. Have a nice lunch, everybody.
>
> Moore: Do you need this note for the record that I wrote this morning?
>
> The Court: If you want to give the note, hand it up here. The deputy will give it to me.

Moore then conveyed this earlier-prepared note to the trial court:

> Your Honor, John Moore would like to go on record to preserve right to call back any or all witnesses called by Prosecutor. I have many, many Q's that I presented to my lawyer to ask but did not. I also want Fred King and all co-defendants called if prosecutor doesn't. I also ask that Det. Moran be kept out of court since he'll be called as a witness.

During the lunch break Moore wrote a letter to the trial judge as the judge had asked during the extended colloquy quoted earlier, but no mention was made of it by the trial judge or Tobik until the end of the trial day:

> Tobik: Your Honor, if I may, Mr. Moore per your instructions prior to I believe it was ou[r] luncheon break prepared a written statement. With the court's permission I will review it with him and we can attach it to the record tomorrow morning.
>
> The Court: All right. You can type it, do whatever you want. Think about it. Ponder over it and we'll talk about it in the morning. Before we start, remind me about it. Okay. Thank you very much.

Before the jury entered the courtroom the next morning, Moore's attorney brought the letter to the court's attention:

> Tobik: Your Honor, I have that letter that you were supposed to get yesterday from Mr. Moore.
>
> The Court: Well, I have the first letter he sent. Is there another letter?

Tobik: Correct.

The Court: Okay.

Moore: The one you told me to write during lunch.

The Court: Well, send it up when you find it. That's all. Defense motion for Rule 29 is overruled.

Tobik: Thank you. Can I go out and look to see if we have the--

The Court: Here, let me read it.

Instead of the proceedings then turning to the resolution of that subject, the transcript reflects that immediately following that exchange the jury entered the courtroom and Tobik called Moore to the witness stand. Moore was then sworn in and began his testimony, responding to questions from his attorney. Here is the unacted-on letter (reproduced verbatim):

Your Honor,

I feel that a lot of my Q's would have promoted facts to my defense of being coerced into making a false confession/statement. A lot of relevant information which could contrast with the states position are not being brought out due to the Q's not being asked or line of Qing not being followed through to the end.

I believe by asking former witnesses, the fact that a lot of information can be brought to light thru asking the revelavant Q. Q's to ascertain state of mind of witnesses, intent of

witness's and the igsistance of a concerted effort on the police behalf to hid facts and distort truth's. · I have given numerous lead's for Mr. Tobik to follow-up on but none were done in a timely fashion to be used in my defense.

As for closing Arguements if you will give me the perameters by which I have to limit my resessatations & statements of fact I'm sure with a reasonable amount of time (48 hrs.) I could write a full assessment of my strategy as well as the means to deliver it to the jury. In closing I have tried to comply with all orders of the court and only wish to get both the truth (in full) and my version of events related to the jury before deliberations commence. I feel that I am in a position to watch but not participate, to witness but not contribute even though I have firsthand knowledge ofentime procedings. I'm if I may put it in example. Being expected to fight a championship boxer in a title fight with my left hand tied & my right broken. I could still fight but the chances of success is zero to none.

I would like to assist Bob Tobik to the best of my abilities and on important matters of strategy & fact toward witnesses & evidence. But if my contributions will be continueously ignored then I would ask that you allow him to assist me in continueing my defense. If that can not be accomplished, I ask that you recall past witneses and they be asked Q's I deem relevant and future witnesses & evidence be

reviewed to help better form defense. If none of the before mentioned requests can be granted I ask that you read this entire document into the record and you allow me to proceed pro-se after a reasonable continuance (48 hrs) for sole purpose of reviewing documents in Prosecutor's control and to formulate a full encompassing strategy & to write both closing arguement and formulate Q's to be asked to me when I take [the] witness stand in my defense. This time will also be used to familiarize myself with the rules, protocols, and procedures of trial. My final request is that this document not be scrutinized by prosecution until such time as I am prepared to act in my own defense. I apologize for any inappropriate behavior in the courtroom and will continue to conduct myself in a respectful manner for the duration of trial.

Thank you
John C. Moore
Sept. 14, 2000 1:00 p.m.
Thursday Written on direction of judge
Honorable Timothy McGinty

P.S. on pg. #3
I also request that I be allowed to apologize to [the] jury and they be made fully aware of why the earlier incident took place and the resolution [was] decided and why.

Sincerely
John C. Moore

P.S. II

> This should in no way reflect negatively on Mr. Robert Tobik who I hold in high regard and respect immensely. I just feel my defense should be handled a little differently and since the eventual outcome will impact me the most that I should have input into strategy & decision making [it] part of my defense.

Well into Moore's direct testimony, the trial judge held a sidebar regarding a hearsay objection and raised the contents of the letter to the prosecutor and Moore's defense counsel:

> The Court: Now, while we're at the side bar, we have -- whatever you think is necessary in the defense. I have a letter from him in which he vacillates the letter given to me a minute ago.
>
> Tobik: I believe he also asked you not to share that with the prosecutor.
>
> Prosecutor: Of course the prosecutor demands to see that letter. It is a communication to the court. I demand that I see it.
>
> The Court: You don't see that that would compromise any defense strategies here? It has the potential for doing so. But, he wants to participate in closing arguments. He doesn't specifically ask to take over his own defense.
>
> Tobik: I think he does. He wants to take over from that point.

The Court: He wants to and he later says he would like to go pro se, but I'm not sure. He wants to go as cocounsel apparently, but, he got up on the witness stand so I don't know if that's an abandonment of what he just gave me beforehand or what.

Anyway, we will discuss it with him. We told him in the last trial, and I told him in this trial he is allowed -- I will give him a chance to make a speech at the end of your examination. If he wants to make a statement outside of what he said, he can but he is subject -- I'm sure you advised him he is subject to cross-examination and will be subject to all the rules of evidence and all the doors he may open on himself.

Tobik: I think--

The Court: That's the danger of making such a statement.

Tobik: Right. You know, of giving a speech, but he can do so if he wants.

Tobik: I think he understands the procedures and the rules in the court and, you know, I think he would be responsive to both my questions and Mr. Mahoney's questions.

The Court: We will inquire of him later on again to see where he is at. I can't make heads or tails from that letter, the combination of the letter and his actions here getting up on the witness stand.

After direct and partial cross-examination of Moore, the court called for a break. During that break this dialogue occurred outside the presence of the jury:

> The Court: Have a seat, everybody, please. Now, the court received your letter here this morning. I read it after you got on the witness stand, Mr. Moore, and you have asked a couple of things. I'm not quite sure what you want, but you wanted a chance to address the jury. The court would certainly give you that. You had the chance. Your attorney asked is there anything you wanted to say. You gave your statement. That is what you are looking for. Do you want to impress the jury again at end of this?
>
> Moore: I think it's appropriate in light of I interrupted the proceedings.
>
> The Court: You want to address the jury and apologize you said for interrupting the proceedings?
>
> Moore: Right.
>
> The Court: Okay. Well, that's fine. You can do that. I will allow you to do – you would have a redirect. You can ask him the question if he has something to say to the jury.
>
> Moore: Not just the jury. It was you, too.
>
> The Court: Your apology is accepted here. You don't have to apologize to me in front of the jury. Now, if you want to do it to the jury, it's your business. I don't care about it or you can

> ask that open-ended question. Again, that would subject you to cross-examination for whatever you say of course.
>
> Tobik: Your Honor--
>
> The Court: So you talk it over and whatever you want to do, that's fine. Okay. Have a nice break here.

When the jury returned, an officer in the Scientific Investigation Unit of the Cuyahoga County Sheriff's Department was examined and then the court took a lunch break. After the lunch break the prosecutor continued with cross-examination of Moore. Upon completion of redirect and recross-examination of Moore, the defense rested. Tobik presented Moore's closing argument. No further mention of Moore's letter or request to proceed pro se appears in the trial transcript. Moore was found guilty by the jury on the three counts against him.

Moore's conviction was affirmed by the Court of Appeals of Ohio (although the imposition of consecutive sentences was reversed and remanded for resentencing), and the Supreme Court of Ohio denied leave to appeal. Moore then petitioned for a writ of habeas corpus from the United States District Court for the Northern District of Ohio. Adopting the magistrate judge's Report and Recommendation, the district court granted Moore a conditional writ of habeas corpus, subject to retrial by the state, grounded in the denial of his right to self-representation. Warden Haviland filed a timely notice of appeal to this court.

II. Standard of Review

We review a district court's legal conclusions in a habeas petition de novo (*King v. Bobby*, 433 F.3d 483, 489 (6th Cir. 2006)). Although findings of fact are usually reviewed for clear error, "when the district court's decision in a habeas case is based on a transcript from the petitioner's state court trial, and the district court thus makes 'no credibility determination or other apparent finding of fact,' the district court's factual findings are reviewed de novo" (*Wolfe v. Brigano*, 232 F.3d 499, 501 (6th Cir. 2000), quoting *Moore v. Carlton*, 74 F.3d 689, 691 (6th Cir. 1996)). We assume factual findings of the state court are correct unless controverted by convincing contrary evidence (*Harries v. Bell*, 417 F.3d 631, 635 (6th Cir. 2005)).

Under 28 U.S.C. §2254(d) ("Section 2254(d)") it is appropriate to grant a prisoner's habeas petition if the adjudication of the claim in the state court system:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Some elaboration of those alternatives will better focus the analysis.

First, law is "clearly established" from "the holdings, as opposed to the dicta, of [the Supreme]

Court's decisions as of the time of the relevant state-court decision" (*Williams v. Taylor*, 529 U.S. 362, 412 (2000)). As for the statutory requirement that the state decision be "contrary to" such "clearly established" federal law, that condition is satisfied "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts" (*id.* at 413).

Second, "unreasonable application" of clearly established federal law occurs "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case" (*id.*). Merely erroneous or incorrect application of clearly established federal law does not suffice to support a grant of habeas relief. Instead the state court must be objectively unreasonable as well as erroneous in its application of clearly established federal law (*id.* at 409-11).

III. Constitutional Right to Self-Representation

Although courts are most frequently called upon to deal with and to enforce the Sixth Amendment guaranty that every criminal defendant facing potential incarceration has the right to counsel at all "critical stages" of the criminal process (*United States v. Wade*, 388 U.S. 218, 223-27 (1970); *Argersinger v. Hamlin*, 407 U.S. 25 (1972)), the Constitution also affords--with equal importance--the right to self-representation (*Faretta v. California*,

422 U.S. 806 (1975)).[2] Those two rights are mutually exclusive, and invocation of one is necessarily intertwined with waiver of the other. Just as had earlier been done with the right to counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963)), *Faretta* incorporated against the states a criminal defendant's right to self-representation via the Fourteenth Amendment's Due Process Clause. *Faretta*, 422 U.S. at 819-20 (footnote omitted), the only clearly established federal law (within the meaning of Section 2254(d)(1)) that is relevant to this habeas petition, confirmed that right in these straightforward terms:

> Although not stated in the Amendment in so many words, the right to self-representation--to make one's own defense personally--is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

Waiver of the right to counsel by an accused must be knowing, voluntary and intelligent (*Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)). For any such waiver to be effective, the accused "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'" (*Faretta*, 422 U.S. at 835, quoting

---

[2] Nothing in last month's teaching by the Supreme Court as to the scope of the *Faretta*-stated right under wholly different circumstances (*Indiana v. Edwards*, 554 U.S. ___, 128 S.Ct. 2379 (2008)) impacts on the decision here.

Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942).

For his part, Haviland contends that Moore's request to proceed pro se was unclear and equivocal, so that the trial judge was not required to engage in any further exploration of the matter. To the contrary, Moore twice expressly asked the judge whether he could "go pro se." Instead of responding directly or promptly launching the necessary *Faretta*-based inquiry, the judge responded by warning Moore that he had never seen a successful pro se defendant and by then asking Moore to draft a letter over the lunch break outlining his competence and trial strategy. Moore did so, but his attorney--with the court's permission--did not tender the letter to the court until the following morning.

Moore's letter set out four alternative scenarios, the fourth of which was to proceed pro se.[3] With the trial judge having failed to grant any of Moore's first three alternatives, he was duty bound to treat the letter as a clear request to proceed pro se, written by the accused after the court had cautioned him against the soundness of that decision. Moore's request to proceed pro se was no less voluntary because it was contingent on the denial of other options that he might also find

---

[3] Significantly, each of the other three alternatives involved substantial personal involvement in his defense by Moore himself. Thus the final request for outright pro se representation was not at all an introduction of a new concept, but rather carried forward the same unequivocal assertion that Moore had conveyed in the oral colloquy first quoted in this opinion.

palatable (*Jones v. Jamrog*, 414 F.3d 585, 592-93 (6th Cir. 2005)). While the state appellate court did not explicitly hold that Moore asked unequivocally to proceed pro se, it did state "that he wished to proceed pro se" and "requested permission to proceed pro se in his letter to the court" (*State v. Moore*, No. 78751, 2002 WL 664104, at *4-*5 (Ohio App. Apr. 18, 2002)).

Although the trial judge expressed an initial concern as to the timeliness of Moore's request, he backed off that track and instead told Moore to write him a letter outlining his proposed self-representation. For the judge then to have waited to read the letter until Moore had already taken the witness stand, rather than addressing the issue promptly, gave Moore no choice but to proceed with counsel conducting direct examination. Then for the judge not to have engaged Moore in a *Faretta*-compliant colloquy upon reading the letter was an unreasonable application of *Faretta*. Moore had made not one but two clear requests to proceed pro se--the second in a letter written after cautionary statements by the court--and it was clearly contrary to *Faretta* for the court to have failed to address those requests promptly and fully.

Warden Haviland argues that Moore's requests were untimely and that a trial court has discretion over whether to grant a request to proceed pro se mid-trial. But Moore's requests were not rejected for untimeliness, either at trial or by the state appellate court. Although the state courts did not do so, our dissenting colleague would reject Moore's exercise of his *Faretta* right on untimeliness grounds. We have no quarrel of course with the

notion that a defendant's invocation of the right of self-representation must be timely--but here it was not until the trial was well under way that Moore's grounds for dissatisfaction with counsel's representation arose--and he then acted swiftly. Moore can scarcely be faulted on some concept of tardiness under those circumstances. If he had not acted when he did--if he had waited for the trial to conclude and then sought postconviction relief on the basis of constitutionally ineffective representation by his appointed counsel--we can be quite certain that he would have been met not only with arguments as to asserted substantive inadequacies of that contention but with the added argument that he should have raised that issue when it first arose at trial.

To return to the treatment at the trial court level of Moore's requests to represent himself, the trial court flat-out failed to exercise its discretion and ultimately did not rule on those requests, but let the issue go by default instead. Such failure to make a ruling on a criminal defendant's unequivocal request to proceed pro se was objectively unreasonable in light of *Faretta*.

Contrary to Haviland's assertions and to the state appellate court's analysis, *McKaskle v. Wiggins*, 465 U.S. 168 (1984) is not on point here. *McKaskle* addresses the constitutional boundaries of standby counsel's involvement in criminal proceedings against the wishes of a pro se defendant. Moore never became a pro se defendant, nor was his attorney standby counsel. Moore does not complain that his attorney overstepped his bounds as standby

counsel--rather he complains that he was denied his right of self-representation. For the state appellate court to read *McKaskle* to find a waiver of Moore's right to self-representation was an objectively unreasonable application of that decision.

Moore did take the stand and respond to questions from his attorney after his request to proceed pro se. But by contrast with *McKaskle*, no presumption of acquiescence attaches to that representation by counsel, because Moore was never permitted to proceed pro se. Without having ruled on Moore's two requests for self-representation, the trial judge told Moore's attorney to call the next witness and Moore was called to testify. It would be wholly unreasonable to require Moore, in order to preserve his requests to proceed pro se, to refuse the trial court's orders to continue with the trial, especially in light of the court's having previously admonished him for disrupting the trial. Moore's responsiveness to questions posed by his attorney was neither a withdrawal of his previous requests to proceed pro se or a waiver of his right to self-representation.

IV. Conclusion

Given the state courts' objectively unreasonable misapplication of the law as clearly established in *Faretta*, Moore's habeas petition must be granted. By failing to rule on Moore's unequivocal requests to proceed pro se, the trial court deprived him of his Sixth Amendment right to self-representation. Moore's conviction cannot stand in light of that structural error, which "is not amenable to 'harmless error' analysis" (*McKaskle*, 465 U.S. at

177 n.8). Accordingly the district court's issuance of a conditional writ of habeas corpus is **AFFIRMED**.

DISSENT

ROGERS, Circuit Judge, dissenting. Where a criminal defendant waits until the final day of trial to invoke his right to self-representation, a trial judge does not unreasonably apply clearly established federal law in declining to grant that request. Therefore, I would reverse the order granting a conditional writ of habeas corpus here.

Faretta v. California, 422 U.S. 806 (1975), upon which Moore relies for relief, did not announce an unqualified right to self-representation. In holding that a defendant's rights were violated when he was not permitted to proceed *pro se*, the Supreme Court stressed not only that his request for self-representation was made "clearly and unequivocally," *id.* at 835, but that it was made far in advance of trial. The Court mentioned the timing of the defendant's request no fewer than three times, noting that the request was made "[w]ell before the date of trial," *id.* at 807, and "weeks before trial," *id.* at 835, and that a hearing on the motion was held "[s]everal weeks thereafter, but still prior to trial," *id.* at 808. The Court then concluded the opinion by holding that "[i]n forcing Faretta, *under these circumstances*, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right." *Id.* at 836 (emphasis added). Thus, although the Supreme

Court did not explicitly impose a timeliness requirement, it "incorporated the facts of *Faretta* into its holding." *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005); *see also United States v. Young*, 287 F.3d 1352, 1354 (11th Cir. 2002) ("The Court mentioned the timeliness of the request in both the opening paragraphs and the breadth with which the Court announced its decision.").

Accordingly, as the Supreme Court has recognized, "most courts" have interpreted *Faretta* to require that a defendant assert his right to self-representation "in a timely manner." *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 161-62 (2000); *see also, e.g., Wood v. Quarterman*, 491 F.3d 196, 201-02 (5th Cir. 2007); *United States v. Edelmann*, 458 F.3d 791, 808 (8th Cir. 2006); *United States v. Young*, 287 F.3d 1352, 1353-55 (11th Cir. 2002); *United States v. Martin*, 25 F.3d 293, 295-96 (6th Cir. 1994); *United States v. Brown*, 744 F.2d 905, 908 (2d Cir. 1984); *United States v. Lawrence*, 605 F.2d 1321, 1325 (4th Cir. 1979). This view is consistent with the traditional rule that a defendant's right to represent himself "is sharply curtailed" once a trial begins. *See United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965). Under this rule, which *Faretta* did not purport to alter, the decision of whether to grant a motion to proceed pro se made after trial has begun is left to the "sound discretion of the trial court." *Lawrence*, 605 F.2d at 1324; *see also Robards v. Rees*, 789 F.2d 379, 384 (6th Cir. 1986).

This court, like most others, has consistently declined to find constitutional error in the denial of a

request for self-representation made after the initiation of meaningful proceedings. In *Robards v. Rees*, 789 F.2d at 383-84, for example, this court held that the denial of a defendant's *pro se* request did not violate his rights where that request was made after the jury was sworn in and roll had been called. The grant of such an untimely request, this court held, "would have impermissibly delayed the commencement of the trial." *Id.* at 384. Although this court also noted that the defendant had not exhibited a genuine desire to represent himself, *id.* at 383-84, our subsequent decisions have made clear that tardiness alone is sufficient grounds for denying a motion for self-representation. In *United States v. Conteh*, 234 F. App'x 374, 381 (6th Cir. 2007), we held that it was not an abuse of discretion to deny a request made "after trial began," stating simply that "[t]he motion was untimely." *See also United States v. Pleasant*, 12 F. App'x 262, 266-67 (6th Cir. 2001) (motion was properly denied where made "on the day of trial with prospective jurors standing outside of the courtroom"); *Martin*, 25 F.3d at 295-96 (denial of motion made "after the trial was in full swing [was] a fortiori a proper exercise of discretion").

If it was constitutional to deny the right to self-representation in those cases, then surely the same was permissible here. Moore did not even express interest in proceeding *pro se* until the fourth day of a five-day trial, and did not make a request to do so that was even arguably clear until the fifth and final day of trial. Moreover, there is no doubt that granting Moore's request would have seriously derailed the proceedings. In his note to the trial judge, for example, Moore acknowledged that he

would need to "review[] documents in [the] Prosecutor's control," "formulate a full [and] encompassing strategy," "formulate [questions] to be asked of [him] when [he took the] witness stand," and "write the closing argument." While one must suspect that a longer period would have been needed, even the two-day continuance that Moore requested to allow for the completion of these tasks would have caused a significant disruption. Though the state trial judge never made a formal ruling on Moore's motion for self-representation, his decision not to grant Moore's request was in effect a denial.

Timeliness, moreover, cannot be measured from when a defendant perceives the need to represent himself. *See Stenson v. Lambert*, 504 F.3d 873, 879, 884-85 (9th Cir. 2007). Supreme Court precedent does not provide defendants with a right to demand self-representation based on "dissatisfaction with counsel's representation" arising during the trial. *See* Maj. Op. at 10. Recognition of such a right would effectively do away with any meaningful timeliness requirement. Habeas relief accordingly cannot be granted on this ground.

And, because the state trial judge could have simply denied Moore's motion as untimely, it is not an objectively unreasonable application of clearly established federal law to conclude that a *Faretta* hearing was not necessary. Just as nothing in *Faretta* requires a court to grant a motion for self-representation made after meaningful proceedings commence, nothing in that decision, or any other Supreme Court case, mandates that a hearing be held on such an untimely request. Thus, although it

may have been preferable for the state trial judge to have engaged in a *Faretta* inquiry and to have ruled formally on Moore's motion, his failure to have done so does not warrant issuance of the writ.

That the state court of appeals did not base its decision on the untimeliness of Moore's request does not prevent reliance on that ground now. Here, as the magistrate Report and Recommendation adopted by the district court acknowledges, the state court of appeals "did not analyze whether the trial court properly handled Moore's request to represent himself under the clearly established federal law announced in *Faretta*." That court never, for example, inquired into whether Moore's alleged *pro se* requests were unequivocal or vague, as *Faretta* clearly requires. Moreover, the state court of appeals appears to have examined Moore's claims under state cases instructing judges how to respond to trial complaints of ineffective assistance of counsel.

In a situation such as this, where the most recent state adjudication "does not squarely address the federal constitutional issue in question, but its analysis bears 'some similarity' to the requisite constitutional analysis," *Filiaggi v. Bagley*, 445 F.3d 851, 854 (6th Cir. 2006), a habeas court must conduct an independent inquiry of the record and applicable law, and may reverse only if the state court result was contrary to or an unreasonable application of federal law, *Maldonado v. Wilson*, 416 F.3d 470, 475-76 (6th Cir. 2005). This modified form of AEDPA deference allows, and indeed requires, a federal court to deny habeas relief on any rationale that the record

will support, even one that was not directly relied upon.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN C. MOORE, JR.

Petitioner,

-vs-

JAMES HAVILAND, Warden,

Respondent.

CASE NO. 1:04 CV 0242

ORDER AND OPINION
ADOPTING REPORT AND RECOMMENDATION
AND GRANTING A CONDITIONAL
WRIT OF HABEAS CORPUS
Dated: February 28, 2007

UNITED STATES DISTRICT JUDGE LESLEY WELLS

On 11 February 2004, petitioner John C. Moore, Jr. filed with this Court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Docket No. 1). Mr. Moore's habeas petition was referred to United States Magistrate Judge William H. Baughman for a Report and Recommendation ("R&R"). (Docket No. 7). The R&R recommends that this Court grant a conditional writ of habeas corpus

on the grounds that the state trial and appellate courts acted contrary to Mr. Moore's Sixth and Fourteenth Amendment rights of self-representation. (Docket No. 32). The respondent filed objections to this recommendation, urging this Court to deny Mr. Moore's petition (Docket No. 34), and the petitioner responded in support of the Magistrate Judge's recommendations (Docket No. 35).

For the reasons set forth below, the court will adopt Magistrate Judge Baughman's R&R and grant a conditional writ of habeas corpus, subject to Mr. Moore being re-tried by the state.

I. BACKGROUND

In September 2000, petitioner John Moore was tried in the Cuyahoga County Common Pleas Court for crimes stemming from a robbery at the Hard Rock Cafe in Cleveland, Ohio. *State v. Moore*, 2002 WL 664104 at *1 (Ohio App. 8 Dist. April 18, 2002). The State of Ohio presented evidence to prove that Mr. Moore and an accomplice arrived at the restaurant early on a Sunday morning, held a gun to the kitchen manager's head and demanded money, and then tied up the kitchen manager and another employee with duct tape before leaving. *Id.*

The Eighth District Court of Appeals related the following relevant discussions which took place on the third and fourth day of Mr. Moore's trial:

> On September 14, after several days of trial, immediately following a break in which the attorney was instructed to discuss whether or not a certain witness should be called, defense counsel approached the bench and stated,

> my client has given me a request of instructions and I have informed him that this is not the appropriate time to place this on the record. And I'm telling the court that I would like time after the State's case and before our case, but he has some things which I think they are perhaps dissatisfaction with the way I'm representing him that he would like to tell the court or have me tell the court.

THE COURT: Well, that's all very nice. You know, we will certainly take that all into account. Thank you. Let's go.

The court then tried to proceed with trial, but defendant repeatedly interrupted. He stated, "I asked [my attorney] to deliver a letter. I don't think he gave it to you." The court informed him that it was not the appropriate time for this discussion, to which defendant replied, "Excuse me, your Honor, before we start up, I want to make sure I preserve-." The court interrupted him and told him not to speak in front of the jury. The court then said "When we are at a break, we will have another-." Defendant then interrupted the court and said, "we were at a break. He handed you a note."

Following [a] discussion of the events of a trial of a co-defendant, the court informed defendant that he could say whatever he wanted when he testified. Defendant attempted to clarify that "[t]hese are questions for witnesses that were already here." The

court told him to be quiet and that he could say anything he wanted to on the witness stand.

Defendant responded, "I'm trying to communicate with the court but nobody is letting me." The court again ordered him to stop speaking until the jury was no longer in the room.

Later that day, the court spoke on the record with the defendant outside the presence of the jury. Defendant again explained that his attorney was not asking questions he considered necessary for his defense and that he had written a note to the judge informing him of it. The judge acknowledged that he had not seen defendant's note and told defendant that although he could suggest questions to his counsel, counsel "is the one who makes that decision as to the specifics of the questions and witnesses."

Defendant asked, "then what do I have to do to make a decision on what questions are asked and who's called and not called? What do I have to do right now to do that because I feel that I have some very important questions that are not being asked." The court responded by telling him first that his court-appointed counsel was very qualified and "is highly respected in the community."

The court went on to tell him, "[n]ow you could have hired your own attorney or you can go pro se and be your own attorney * * *." He

then discouraged defendant from going pro se, stating that he had never seen anyone succeed pro se. Nevertheless, defendant then asked repeatedly to go pro se.[1]

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[1] This part of the colloquy in its entirety is recorded as follows in the trial transcript:

The Court: Now, you could have hired your own attorney or you can go pro se and be your own attorney, which is of course, a very dubious action for anybody to take, and I personally, in 28 years as an officer of the court, have never seen anybody successful in that regard. In fact, I don't even know of a case in Cuyahoga County where someone has been successful at a trial acting as their own attorney pro se. But you always have that option.

The Defendant: So you are saying that's the only way that I can get all my questions –

The Court: The dream team is occupied here. We can –

The Defendant: Can I go pro se?

The Court: --get Johnnie Cochran or F. Lee Bailey.

The Defendant: Can I go pro se then?

The Court: You want to go at this point –

The Defendant: You are leaving me with no other option. You are saying that the only way –

The Court: It is too late for that now. You have already started with an attorney. I don't believe you can go mid trial.

The Defendant: That's what I'm asking. I asked you what do I have to do.

The Court: I don't think you're in a position to discharge your attorney. You haven't demonstrated any knowledge of the law or willingness to comply

The court first told him "[i]ts too late for that now. You have already started with an attorney. I don't believe you can go mid trial." [ ] The court also stated that defendant had

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with the orders of the court or understanding of the rules of evidence.

The Defendant: I've tried to get –

The Court: And basic politeness. I will entertain that thought. If you want to put it in writing over the lunch hour, I will instruct the deputies to allow you to have your paper and pencil or pen and allow you to make a written motion if you want to do so over this lunch period and explain to me your plans for trial, your strategy and – not specific, but your general capability of conducting a trial. I don't see any right now. You would not be in a position to conduct the final argument.

The Defendant: Can I ask you a question?

The Court: You would be waiving final argument because you would be incapable of presenting what a pro se final argument would have to be. It would be, you know, a very dubious action. Again, I have never seen it happen. It's theoretically possible it could happen where it could be successful. It's theoretically possible that you could. It's possible that you can be hit by a meteor.

The Defendant: A what?

The Court: A meteor, right? Things that come from space and they invade the earth's atmosphere and they hit the earth on a day-by-day basis. I'm told. I have never seen one though. Not striking anyhow.

(Docket No. 20, Tr. 842-845).

not "demonstrated any knowledge of the law or willingness to comply with the orders of the court or understanding of the rules of evidence." [ ] At that point defendant gave the brief note to the judge stating his complaints about his attorney.[FN1]

> FN1. The note states, "Your Honor, John Moore would like to go on record to preserve right to call back any or all witnesses called by Prosecutor. I have many, many Q's that I presented to my lawyer to ask but did not. I also want Fred King and all co-defendants called if prosecutor doesn't. I also ask that Det. Moran be kept out of court since he'll be called as a witness."

The court then changed its position and told defendant to write and submit his request during the lunch break, including "your plans for trial, your strategy, * * * your general capability of conducting a trial" and stated it would review the request. Defendant reiterated that all he wanted was "a right to call them witnesses." [ ]

After the lunch break, defense counsel told the court that defendant had given him the "written statement. With the court's permission I will review it with him and we can attach it to the record tomorrow morning." The court instructed counsel to remind it about the letter before trial began in the morning. The court then proceeded with the cross-examination of one of the detectives.

The next morning counsel informed the court that he had the letter the court had instructed defendant to write. The court responded, "Well, I have the first letter he sent. Is there another letter?" The court was informed that the letter in discussion was the one he instructed defendant to write during the previous day's lunch break. The court responded, "[w]ell, send it up when you find it. That's all. * * * " The court accepted the letter and then ordered the jury into the room.[2]

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[2] The letter from defendant stated:
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Your Honor,

I feel that a lot of my Q's would have promoted facts to my defense of being coerced into making a false confession/statement. A lot of relevant information which could contrast with the states (sic) position are not being brought out due to the Q's not being asked or line of Qing not being followed through to the end.

I believe by asking former witnesses, the fact that a lot of information can be brought to light thru asking the relevant [sic] Q. Q's to ascertain state of mind of witnesses, intent of witness's and the igsistance [sic] of a concerted effort on the police behalf to hid [sic] facts and distort truth's [sic]. I have given numerous lead's [sic] for Mr. Tobik to follow-up on but none were done in a timely fashion to be used in my defense.

As for closing Arguements [sic] if you will give me the perameters [sic] [boundries] by which I have to limit my resessatations [sic] & statements of fact I'm sure with a reasonable amount of time (48 hrs.) I could write a full assessment of my strategy as well as the means to deliver it to the jury. In closing I have tried to comply with all orders of the court and only wish to get both the truth (in full) and my version of events related to the jury before deliberations commence. I feel that I am in a position to watch but not

The defense then began its case, calling the defendant as a witness.

Later that day while at a side bar, the court stated "while we're at the side bar, we have-whatever you think is necessary in the

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participate, to witness but not contribute even though I have firsthand knowledge ofentime [sic] procedings [sic]. I'm if I may put it in example. [sic] Being expected to fight a championship boxer in a title fight with my left hand tied & my right broken. I could still fight but the chances of success is [sic] zero to none.

I would like to assist Bob Tobik to the best of my abilities and on important matters of strategy & fact toward witnesses & evidence. But if my contributions will be continueously [sic] ignored then I would ask that you allow him to assist me in continueing [sic] my defense. If that can not be accomplished, I ask that you recall past witneses and they be asked Q's I deem relevant and future witnesses & evidence be reviewed to help better form defense. If none of the before mentioned requests can be granted I ask that you read this entire document into the record and you allow me to proceed pro-se [sic] after a reasonable continuance (48 hrs) for sole purpose of reviewing documents in Prosecutor's control and to formulate a full encompassing strategy & to write both closing arguement [sic] and formulate Q's to be asked to me when I take [the] witness stand in my defense. This time will also be used to familiarize myself with the rules, protocols, and procedures of trial. My final request is that this document not be scrutinized by prosecution until such time as I am prepared to act in my own defense. I apologize for any inappropriate behavior in the courtroom and will continue to conduct myself in a respectful manner for the duration of trial.

Thank you
John C. Moore
Sept. 14, 2000 1:00 p.m.
Thursday Written on direction of judge Honorable Timothy McGinty.
* * *

defense. I have a letter from him in which he vacillates [sic] the letter given to me a minute ago." The court then states that defendant "doesn't specifically ask to take over his own defense." Defense attorney contradicts the court saying he thinks that the defendant does want to take over his own defense. The court responds, "He wants to and he later says he would like to go pro se, but I'm not sure. He wants to go as cocounsel [sic] apparently, but, he got up on the witness stand so I don't know if that's an abandonment of what he just gave me beforehand or what.

Anyway, we will discuss it with him. We told him in the last trial, and I told him in this trial he is allowed-I will give him a chance to make a speech at the end of your examination. If he wants to make a statement outside of what he said, he can ***."

Finally, the court said "[w]e will inquire of him later on again to see where he is at. I can't make heads or tails from that letter, the combination of the letter and his actions getting up on the witness stand."

During another break in defendant's testimony, the court addressed the defendant on the record while the jury was out of the room. The court stated:

> Now, the court received your letter here this morning. I read it after you got on the witness stand, Mr. Moore, and you

> have asked a couple of things. I'm not sure what you want, but you wanted a chance to address the jury. The court would certainly give you that. You had the chance. Your attorney asked is there anything you wanted to say. You gave your statement. This is what you are looking for. Do you want to impress the jury again at the end of this?
>
> Defendant replied that he wished to apologize to the jury and the court for his interruptions. The court reminded him that he would be opening himself up to cross-examination. Defense counsel began to speak, "Your Honor"- but the court interrupted him saying, "[s]o you talk it over and whatever you want to do, that's fine. Okay. Have a nice break here." Nothing further was said about defendant's request.

Moore, 2002 WL 664104 at **2-4.

The jury convicted Mr. Moore of aggravated robbery and two counts of kidnapping, all with firearm specifications, and the trial court imposed maximum and consecutive sentences. *Id.* at *1.

Mr. Moore appealed his conviction to the Ohio Court of Appeals, raising eight assignments of error, including denial of the constitutional rights to effective assistance of counsel, self-representation, due process and a fair trial, as well as denial of his right to cross-examine witnesses and confront witnesses. *Moore*, 2002 WL 664104. The state appellate court affirmed Mr. Moore's conviction,

finding seven of his eight assignments of error without merit. The appellate court did find that the trial court violated Mr. Moore's right to due process when it failed to making a finding that the consecutive sentences imposed were not disproportionate to the offense. Mr. Moore's sentence was reversed and remanded for resentencing. *Id.* at 14. The Ohio Supreme Court denied leave to appeal on 29 January 2003. (Docket No. 1).

Mr. Moore now petitions this Court for a writ of habeas corpus to remedy four alleged constitutional violations:

1. The trial court deprived the petitioner's Sixth and Fourteenth Amendment right to self-representation;

2. The trial court deprived the petitioner's Sixth Amendment right to effective assistance of counsel when it failed to make an adequate and timely inquiry into Petitioner Moore's complaints;

3. The petitioner was denied his constitutional rights to cross-examine witnesses when the trial court improperly overruled his motion asserted under Ohio Crim. R. 16(b)(1)(g); and

4. The petitioner's Sixth Amendment right to confront a witness was denied when the trial court permitted a police officer to testify by reading from a police report.

(Docket Nos. 12, 26).[3]

II. REPORT & RECOMMENDATION

This matter was referred on 24 February 2004 to Magistrate Judge Baughman for an R&R. (Docket No.7). Magistrate Judge Baughman filed his R&R on 27 July 2006. (Docket No. 32). Concluding that Mr. Moore's first ground for relief is meritorious, the Magistrate Judge advises that Mr. Moore should be granted a conditional writ, subject to being re-tried by the state. The R&R further recommends that ground two be dismissed as moot and that grounds three and four be dismissed as time-barred.

With regard to Mr. Moore's first claim for relief, the R&R relied on *Faretta v. California*, 422 U.S. 806 (1975) and *McKaskle v. Wiggins*, 465 U.S. 168 (1984) in breaking down its legal analysis into three steps: (1) whether the defendant made a clear, unambiguous and timely assertion of his right to self-representation; (2) whether the record demonstrates that the defendant's assertion was a knowing and voluntary waiver of his right to be represented by counsel; and (3) whether the defendant knowingly and voluntarily acquiesced to representation after asserting his right to self-representation. (Docket No. 32 pp. 19-20). The R&R recommends finding that although the state

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[3] Mr. Moore was represented by counsel when he filed his initial habeas petition which listed only the first and second grounds for relief. Although Mr. Moore continues to be represented by this same counsel, Mr. Moore subsequently motioned this Court pro se to amend his petition to include the third and fourth grounds for relief. (Docket No. 26). The Court granted the motion.

appellate court reasonably applied federal law when it implicitly found that Mr. Moore asserted his right to self representation, the appellate court unreasonably concluded that the trial court made the appropriate inquiry into Mr. Moore's request to proceed pro se.

The respondent vigorously objected to Magistrate Judge Baughman's R&R, arguing that, (1) the state appellate court did not make an implicit finding that Mr. Moore's actions constituted an invocation of his right to self-representation, (2) the Magistrate Judge erred in mandating a distinct three-step analysis of self-representation claims that is not employed by the Supreme Court or the Sixth Circuit; and (3) the Magistrate Judge ignored the Supreme Court's holding in *Wiggins*. (Docket No. 34).

Under Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636 (b)(1)(C), this Court reviews de novo those portions of the Magistrate Judge's R&R to which specific objections are made. Upon review, this Court "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). In the Sixth Circuit, objections to a magistrate judge's R&R "must be clear enough to enable the district court to discern those issues that are dispositive and contentious." *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

As Mr. Moore does not object to the R&R's recommendation that grounds two through four of his petition be denied, the Court will adopt the Magistrate Judge's recommendation on these

grounds without further review. Thus, this Court will only review de novo the portion of the R&R to which the respondent objects, that the state trial and appellate courts acted contrary to Mr. Moore's right to self-representation.

III. LAW AND ANALYSIS

The Sixth Amendment guarantees criminal defendants the right to counsel and the right of self-representation in criminal proceedings. *Faretta*, 422 U.S. 806. These two rights are correlative in that the right to the latter is conditional on the waiver of the former. *United States v. Conder*, 423 F.2d 904, 908 (6th Cir. 1970) ("The right to defend pro se and the right to counsel have been aptly described as two faces of the same coin." Internal quotations omitted.). Accordingly, a criminal defendant shall be permitted to represent himself only after he "knowingly and intelligently" relinquishes his right to counsel. *Faretta*, 422 U.S. at 835 (citing the well-established standard set forth in *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)). The Supreme Court directs trial courts to serve in a protective role when a defendant asserts his right to proceed pro se: "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.*[4] The

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[4] The Sixth Circuit further explains: "Although on average reasonable people might agree that it is in a criminal defendant's best interest to seek representation, ultimately, it is

unconstitutional denial of the right to self-representation is "a structural error, the remedy for which is a new trial." *Jones v. Jamrog*, 414 F.3d 585, 594 (6th Cir. 2005) (citing *Wiggins*, 465 U.S. at 177 n. 8).

A. Respondent's Objections to the Report and Recommendation

The respondent argues that the "crux of the Magistrate Judge's error in this case emanates from his stated belief that *Faretta* and *Wiggins* mandate an identifiable, separate three-step analysis for all self-representing claims." (Docket No. 34 p. 2). This Court disagrees with this assertion because the Magistrate Judge's analysis is wholly consistent with the well-established case law governing the rights to counsel and self-representation. *Faretta* holds that the right to self-representation is protected by the Sixth Amendment, but that assertion of this right requires the waiver of the Sixth Amendment right to effective assistance of counsel. 422 U.S. at 835. *Wiggins* holds that once a pro se defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel are presumed to be within the defendant's acquiescence. Accordingly, the R&R reviews the trial record and appellate

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the defendant who must be free to personally decide whether in his particular case counsel is to his advantage. This choice is at once a choice to exercise an independent Sixth Amendment right, the right to represent oneself, and a choice to forgo another Sixth Amendment right, the right to counsel. The choice, therefore, is in part a waiver and thus must be made knowingly, intelligently, and voluntarily." *Jones v. Jamrog*, 414 F.3d 585, 592 (6th Cir. 2005) (internal citations and quotations omitted).

opinion for appropriate review of Mr. Moore's (1) assertion of right to self-representation, (2) a knowing and intelligent waiver of right to counsel, and (3) whether Mr. Moore's continued representation by counsel was tantamount to Mr. Moore withdrawing his assertion and waiver. The R&R does not create a new legal analysis for selfrepresentation violation claims, as alleged by the respondent, but instead the R&R is enumerating its analysis for sake of clarity.

The respondent further objects to the R&R's recommendation that this Court uphold the state appellate court's finding that Mr. Moore's actions constituted an invocation of his right to self-representation. Specifically, the respondent argues that the Magistrate Judge "simply misread the Court of Appeals opinion" because the appellate court made no such finding. This Court disagrees with the respondent on this point. The appellate opinion states that Mr. Moore "requested permission to proceed pro se in his letter to the court, [but] then immediately contradicted his request by having his attorney continue to defend him." *Moore*, 2002 WL 664104 at * 5. The opinion goes on to criticize the trial judge for his failure "to properly address defendant's complaint at a time when the defendant could have acted on his own behalf." *Id.* Based on these statements, this Court agrees with the R&R that the state appellate court found that Mr. Moore had asserted his right to proceed pro se. Accordingly, this Court finds the respondent's objection on this ground to be without merit.

Finally, the respondent contends that the R&R disregarded *Wiggins* which provides that once a defendant agrees to participation by counsel in his defense, appearances by counsel is presumed to be with the defendant's acquiescence. The Court disagrees with the respondent. *Wiggins* holds, "once a pro se defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence . . . ." In *Wiggins*, the Supreme Court described the defendant as having constantly changed his mind in his efforts to proceed pro se: "Early in the trial Wiggins insisted he wished to proceed entirely without assistance, but shortly thereafter he expressly agreed that counsel should question a witness on voir dire. Wiggins objected vehemently to some of counsel's motions, but warmly embraced others." 465 U.S. at 183. Based on these facts, the Supreme Court concluded that Wiggins' complaints concerning his counsel's representation lost much of its force. For reasons explained below, the facts in the case before this Court are distinguishable from those in *Wiggins*, and the Court agrees with the R&R that the analysis of the state appellate court is an unreasonable application of clearly established federal law.

B. Assertion of right to proceed pro se

The decisive questions in this matter are whether the trial court constitutionally denied Mr. Moore his right to self representation, and whether the state appellate court reasonably applied *Faretta* and *Wiggins* when it concluded that Mr. Moore's participation in a direct examination by his lawyer

constitutes a waiver of his right to self representation.

Mr. Moore asserted his right to self representation but the trial judge unconstitutionally denied him the right by failing to conduct an inquiry into whether Mr. Moore was willing to waive his right to counsel. On the morning of 14 September 2000, Mr. Moore raised questions about his counsel's effectiveness and expressly asked the trial judge twice, "Can I go pro se?" (Tr. at 843). In that same colloquy, Mr. Moore explained to the judge that he believed he had no other option but to proceed pro se. *Id.* After telling Mr. Moore that he could not proceed pro se (Tr. at 843-44), the trial judge changed his mind and informed Mr. Moore that the court would consider his request to proceed pro se upon a written motion to the court. *Id.* at 844. Mr. Moore submitted a written motion to the court, stating if his attorney did not represent him in a manner that Mr. Moore determined was to his best advantage, he requested that the court "allow [him] to proceed pro se [sic] after a reasonable continuance (48 hrs)" for the purpose of reviewing documents, formulating a trial strategy, and preparing his closing argument.[5] The trial judge did not address the motion upon receiving it. Instead, he took possession of the letter and then seated the jury and instructed the defense to proceed with its case. Considering the context in

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[5] The trial judge directed Mr. Moore on the morning of 14 July to draft the motion on his lunch hour and submit it to the court after the lunch break. Mr. Moore complied with the court's order. Mr. Moore's attorney did not deliver the motion to the trial judge until the following morning.

which Mr. Moore's oral and written requests were asserted, this Court finds that Mr. Moore asserted his Sixth Amendment right to self-representation.

Therefore, the dispositive issue in this matter becomes whether the trial judge conducted the appropriate inquiry on the record as to whether Mr. Moore was making a knowing and intelligent waiver of his right to counsel in order to proceed pro se. A trial judge must thoroughly investigate the circumstances under which a waiver of right to counsel is made in order to ensure the waiver is made with the defendant's "eyes wide open." *Fowler v. Collins*, 253 F.3d 244, 249 (6th Cir. 2001). In Mr. Moore's case, the trial judge never made such an inquiry. He accepted Mr. Moore's written request, and then instructed the defense to proceed with its case in chief, which included calling Mr. Moore as the first of two witnesses. By the time the trial judge addressed the written motion, a substantial portion of the defense's case had already been presented. These are simply not facts which support a waiver under *Wiggins*. The trial court unconstitutionally denied Mr. Moore his right to self-representation by its refusal to timely address the request.

The state appellate court concluded that because Mr. Moore permitted himself to be examined on the stand by counsel, this conduct constituted a waiver of his right to self-representation under *Wiggins*. *Wiggins* held that a defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel to relieve the trial judge of the need to explain and enforce basic rules of courtroom protocol and the rules of procedure and

evidence. The Supreme Court further held that participation by standby counsel to steer a pro se defendant through the trial proceedings is not a violation of the Sixth Amendment right to self representation. The flaw in the appellate court's analysis in this case is that Mr. Moore did not at any point act as his own counsel, he was he never appointed stand-by counsel, nor was he even afforded the opportunity to proceed pro se. He is not asserting that stand-by counsel interfered with his Sixth Amendment right to self-representation, but rather that the trial judge interfered with his right when he failed to entertain Mr. Moore's repeated requests to proceed pro se. The trial judge accepted Mr. Moore's written motion and then instructed the defense counsel to proceed despite not having read or considered the motion. As the trial judge gave no indication that he would delay the trial to consider Mr. Moore's request, the only other option Mr. Moore had at that point would be to refuse to take the stand and participate in his own defense. This is hardly a choice for a criminal defendant.[6] Accordingly, the

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[6] In *Jones v. Jamrog*, the defendant standing trial for felonious assault in a Michigan state court was dissatisfied with his counsel's representation. 414 F.3d at 587-88. He requested and was denied access to the state's evidence. *Id.* In explaining to the trial judge his concerns, Jones articulated his belief that he had no other choice but to proceed pro se because of the court's order that he not speak in court and that defense counsel need not provide him with copies of the state's documentary evidence. *Id.* at 587. In granting Jones' habeas petition, the Sixth Circuit recognized that his belief that he had "no choice" was not to be taken literally, but rather the statement reflected a strategic decision in light of his dissatisfaction with his legal representation.

Court agrees with the Magistrate Judge's recommendation that Moore's participation in a direct examination by his counsel was not a waiver of his right to self-representation and the state appellate court unreasonably applied *Faretta* and *Wiggins*.

For the reasons set forth above, the state trial court unconstitutionally denied the petitioner his Sixth Amendment right to self-representation and the state appellate court's conclusion that Mr. Moore knowingly, intelligently and voluntarily waived his right to counsel is an unreasonable application of clearly established Supreme Court precedent. Such a constitutional violation may be remedied by a new trial. *Jamrog*, 414 F.3d at 594.

IV. CONCLUSION

The Court adopts Magistrate Judge Baughman's recommendation and grants a conditional writ of habeas corpus, subject to the Mr. Moore being retried by the state, on the grounds of the state's denial of the petitioner's Sixth Amendment right to self-representation. Accordingly, the petitioner's judgment and conviction in *State of Ohio v. John Moore*, Cuyahoga County Court of Common Pleas No. CR 392440 is vacated and set aside and the petitioner shall be released from custody unless the State of Ohio commences a new trial against him within 120 days after this judgment becomes final.

The Court further adopts the Magistrate Judge's recommendation and denies grounds two through four of Mr. Moore's petition.

IT IS SO ORDERED.

/s/ Lesley Wells
UNITED STATES DISTRICT JUDGE

Date: 28 February 2007

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN C. MOORE, JR.,

Petitioner,

v.

JAMES HAVILAND, Warden,

Respondent.

CASE NO. 1:04 CV 242

Dated: July 27, 2006

JUDGE LESLEY WELLS
MAGISTRATE JUDGE
WILLIAM H. BAUGHMAN, JR.

REPORT & RECOMMENDATION

Introduction

Before the Magistrate Judge for his Report and Recommendation is the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by John Moore, Jr.,[1] as amended.[2] Moore, who is now incarcerated in the Southern Ohio Correctional Facility for a term of thirty-three years,[3] asserts four

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[1] ECF #1 (petition). Moore was here represented by J. Dean Carro.

[2] ECF #26 (amendment). Moore here proceeds *pro se*.

[3] ECF #27 (supplemental return of writ). *See, State v. Moore*, No. 86244, 2006 WL 439961 (Ohio App. 8 Dist. Feb. 23, 2006) (remanding for resentencing); *see also*, www.drc.state.oh.us

grounds for relief arising from his 2000 conviction on one count of aggravated robbery and two counts of kidnapping with firearm specifications by a Cuyahoga County, Ohio jury.[4]

The state acknowledges custody of Moore on the specified conviction but contends that the asserted grounds for the writ are time barred, procedurally defaulted, and/or without merit. Thus, the state argues, Moore's petition should be denied.[5]

For the reasons stated below, the Magistrate Judge recommends that ground one of the petition be conditionally granted, ground two be dismissed as moot, and that grounds three and four be dismissed as time-barred.

Facts

A. Trial

The facts concerning Moore's trial and conviction were set forth by the Ohio Court of Appeals, Eighth District, which affirmed that decision in 2002:

> Defendant and his accomplice arrived very early one Sunday morning at the Hard Rock Café in Tower City. They told the night cleaner who let them in that they were there

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(website of the Ohio Department of Rehabilitation and Correction) indicating that Moore was resentenced on May 23, 2006. The site also notes that Moore is currently serving time for multiple other convictions.

[4] *See, State v. Moore*, No. 78751, 2002 WL 664104 (Ohio App. 8 Dist. April 18, 2002).

[5] ECF #16 (return); ECF #27 (supplemental return).

to interview for jobs. They proceeded to the "safe room" where the kitchen manager was finishing counting money. When defendant's accomplice held a gun to her head, the manager opened the safe and gave him the paper money. Moore demanded that she give him the coins as well. The accomplice then left the room and returned with another female employee. The men proceeded to tie up both women with duct tape. They also gagged the employee with tape but left the manager without a gag when she told them she had allergies and would choke if she were gagged.

After the men left, the women managed to free themselves and called the police. The manager supplied the police with a surveillance tape of the robbers, but because the tape had been reused so many times the quality of the pictures was poor. After NASA enhanced the tapes, still pictures were taken from them which showed defendant in a distinctive baseball cap.

Several days prior to this robbery, a private home had been robbed and its occupant also had been bound and gagged with duct tape. Defendant's accomplice, Lamar Chaney, was identified in a line-up as one of the perpetrators in the private home robbery. The accomplice was then identified by the manager, employee, night cleaner and a fourth employee as one of the robbers at the Hard Rock Café.

> The detectives questioned one of the accomplice's co-defendants, Trent Willis, from the private home robbery, who led police to defendant's home. The police searched defendant's home and later questioned him. Defendant signed a written confession to the Hard Rock Café robbery. The police also took a photo of defendant in the distinctive baseball cap from defendant's home. Finally, an analysis of phone records corroborated all the details contained in defendant's confession.[6]

B. Direct appeals

1. The conviction

Subsequent to the conviction, Moore, now represented by different counsel,[7] appealed[8] and raised four assignments of error:

> 1. The trial court deprived John Moore of his constitutional right to effective assistance of counsel when it failed to make an adequate inquiry into Mr. Moore's complaint that his trial counsel was not doing an acceptable job and had Mr. Moore proceed in the trial with the same attorney;

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[6] *Moore*, 2002 WL 664104, at *1. Factual findings made by the state appellate court on its review of the trial record are presumed correct. 28 U.S.C. § 2254(e)(1); *Brumley v. Wingard*, 269 F.3d 629, 637 (6th Cir. 2001).

[7] The Cuyahoga County Public Defender's Office represented Moore in this appeal. ECF #18 at 18. Robert Tobik represented Moore at trial. *Id.* at 10.

[8] The appeal was filed October 23, 2000. *Id.* at 25. Moore's brief on appeal was filed April 20, 2001. *Id.* at 18.

2. The trial court erred and denied John Moore his constitutional right to effective assistance of counsel when it denied his motion to waive counsel and represent himself;

3. John Moore was denied his constitutional right to cross-examine witnesses against him when the trial court improperly overruled his request, under Ohio Rule of Criminal Procedure 16(B)(1)(g), to cross-examine a state's witness with material inconsistencies in her prior statement;

4. John Moore has been deprived of his liberty without due process of law by his sentences, as his sentences do not comport with Ohio's new sentencing law.[9]

One day afer filing this brief, Moore made a *pro se* motion to file a supplemental brief with additional assignments of error.[10] On July 27, 2001 the Ohio appeals court granted Moore's request and thereupon, again acting through the Cuyahoga County Public Defender, Moore filed a supplemental brief raising four additional assignments of error:

1. Was John Moore deprived of his constitutional right to a fair trial when the trial court took no action following Mr. Moore's allegations that a police officer was signaling desired responses to a state's witness?

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[9] *Id.* at 19.

[10] *See, id.* at 122.

2. Was John Moore denied his Sixth Amendment right to confront the witnesses against him when a police officer introduced hearsay evidence by reading from a police report?

3. Was John Moore denied his constitutional right to effective assistance of counsel when the trial court refused to grant a reasonable continuance so that counsel could prepare adequately for trial?

4. John Moore was denied his constitutional right to effective assistance of counsel when counsel both failed to file an affidavit of prejudice against the judge presiding over his trial with the Cuyahoga Court of Common Pleas and when counsel failed to preserve the record and denied Mr. Moore of an otherwise valid appellate issue?[sic][11]

After the state opposed these assignments of error, [12] the Ohio Court of Appeals, Eighth District, on April 18, 2002, affirmed the judgment of the trial court and overruled all but one of Moore's assignments of error, holding that the imposition of sentence was improper and so remanded the case for resentencing.[13]

On August 7, 2002, Moore, now proceeding through the University of Akron School of Law Appellate Review Office, sought to file a delayed

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[11] *Id.* at 121.

[12] *Id.* at 102-15 (brief in opposition) and 159-66 (supplemental brief).

[13] *Id.* at 167-203; *Moore*, 2002 WL 664104.

appeal[14] with the Ohio Supreme Court.[15] The Ohio Supreme Court approved the motion,[16] and Moore thereupon asserted four propositions of law:

1. The trial court deprived Appellant Moore of his Sixth and Fourteenth Amendment rights to represent himself when it overruled his motion to waive counsel and represent himself;

2. The trial court deprived Appellant Moore of his Sixth Amendment right to effective assistance of counsel when it failed to make an adequate and timely inquiry into Moore's complaints;

   A. The trial court deprived Appellant Moore of his constitutional right to effective representation of counsel when it failed to make an adequate inquiry into counsel's effectiveness;

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[14] Moore's' brief in support of his habeas petition relates that on June 3, 2002 he *pro se* filed a timely notice of appeal to the Ohio Supreme Court which was denied. ECF #18, Ex. 2 at 5. The state observes that the "Ohio Supreme Court Clerk's Office has no record of any such filing or Order." ECF #16 at 4, n.4.

[15] ECF #18 at 204. Principally, Moore argued that his untimeliness arose from his difficulty in obtaining representation as an indigent for his appeal to the Ohio Supreme Court since his former trial attorney, whose representation was the subject of Moore's claims of ineffective assistance, had, subsequent to the appellate court proceedings, been appointed the Chief Public Defender of Cuyahoga County, whose office had represented Moore on appeal, thus creating a conflict of interest. *See, id.* at 206.

[16] *Id.* at 249.

B. The trial court deprived Appellant Moore of his constitutional right to effective assistance of counsel when it refused to grant a reasonable continuance so that counsel could adequately prepare for trial;

C. Appellant Moore was deprived of his constitutional right to effective assistance of counsel when counsel failed to file an affidavit of prejudice against the judge presiding over his trial with the Cuyahoga County Court of Common Pleas and when counsel failed to preserve the record and denied Appellant Moore an otherwise valid appellate issue;

3. Appellant Moore was denied his Sixth Amendment right to cross-examine the witnesses against him when the trial court improperly overruled his request under Crim. R. 16(B)(1)(g) to cross-examine a state's witness with material inconsistencies in her prior statement;

4. Appellant Moore was denied his Sixth Amendment right to confront the witnesses against him when a police officer introduced hearsay evidence from a co-defendant by reading from a police report.[17]

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[17] *Id.* at 251.

The state responded in opposition,[18] and, on January 29, 2003, the Ohio Supreme Court denied leave to appeal.[19] No writ of certiorari was sought from the United States Supreme Court.

2. The sentence

Proceeding on a separate track, Moore pursued relief for claims arising from his sentencing. The original sentence was set aside as part of the judgment affirming conviction entered by the appeals court in 2002.[20] Following the remand for re-sentencing, Moore's sentencing was again reviewed by the state appeals court, which again remanded the case for yet another sentencing.[21] The website for the Ohio Department of Rehabilitation and Correction notes that Moore was re-sentenced on May 23, 2006.[22]

C. Federal habeas claim

1. Original petition

On February 11, 2004, Moore, again represented by the University of Akron School of Law Appellate Review Project, filed the present petition seeking a writ of habeas corpus from this Court on the following two grounds for relief:

1. The trial court deprived Petitioner Moore of his Sixth and Fourteenth Amendment rights to self-representation when it

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[18] *Id.* at 299-307.

[19] *Id.*, Ex. 16.

[20] *Moore*, 2002 WL 664104, at *9.

[21] *Moore*, 2006 WL 439961, at *5.

[22] *See*, n.3, *supra*.

overruled his motion to waive counsel and represent himself.

2. The trial court deprived Petitioner Moore of his Sixth Amendment right to effective assistance of counsel when it failed to make an adequate and timely inquiry into Petitioner Moore's complaints.[23]

The state filed a return of the writ contending that these asserted grounds for relief should be denied because the state appeals court did not unreasonably apply or did not act contrary to the applicable clearly established federal law.[24] Moore filed a traverse taking issue with the state's arguments only as to the first ground for relief.[25]

2. Amended petition

Subsequent to filing the traverse, Moore, now proceeding *pro se*, sought[26] and was granted leave[27] to amend the petition. The amendment presents an additional two grounds for relief:

3. John Moore was denied his constitutional right to cross-examine the witnesses against him when the trial court improperly overruled his request under 16 (b)(1)(g) to cross-examine a witness with material inconsistencies in her prior statement.

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[23] ECF #1, Ex. 2 at i.

[24] ECF #16 at 9, 13.

[25] ECF #22.

[26] ECF #26.

[27] Non-document order of July 21, 2005.

4. John Moore was denied his Sixth Amendment right to confront witnesses against him when a police officer introduced hearsay evidence by reading from a police report.[28]

Moore contends that, despite making "numerous attempts to have [the] Akron School of Law include these issues to no avail," his reading of *Crawford v. Washington*[29] "convinced this defendant that these issues not only had merit but also insured that the current conviction had no legal standings [sic]," and thus required him to proceed *pro se*.[30]

The state, in its supplemental return, contends that, because these new grounds for relief were known to Moore at the time he filed his original habeas petition and because the amended petition was submitted beyond the one-year period for raising habeas claims prescribed by statute, these two new grounds are time-barred.[31] Alternatively, the state maintains that one or both of these additional claims are procedurally defaulted,[32] involve a purely factual issue already resolved by the state courts,[33] and/or were resolved by the state courts in a manner not contrary to nor by an unreasonable application of clearly established federal law.[34]

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[28] ECF #26 at 4.

[29] *Crawford v. Washington*, 541 U.S. 36 (2004).

[30] ECF #26 at 2.

[31] ECF #27 at 10.

[32] *Id.* at 13.

[33] *Id.*

[34] *Id.* at 16.

Moore, once more represented by the University of Akron School of Law Appellate Review Project, initially responded to the state's supplemental return by seeking to stay these proceedings[35] and, alternatively, by contending that the one-year statute of limitations should be calculated from the time the trial court's first resentencing order became final.[36] The Magistrate Judge denied the motion to stay.[37]

Moore thereupon submitted what was styled a "merit reply" to the state's supplemental return in which Moore asserts that the state appeals court did not clearly rely on a state procedural rule in addressing what is now the third ground for relief, so procedural default is not applicable.[38] Further, Moore argues that the state did not prove that the error from allowing the hearsay, as is alleged by the current ground four, was harmless and so cannot be a reasonable application of or in conformity with clearly established federal law.[39]

Analysis

A. Grounds three and four – statute of limitations

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[35] ECF #28. Moore was concerned that a then-pending state appeal from his re-sentencing might make his habeas petition unexhausted. That appeal has now been concluded and Moore re-sentenced according to its ruling. *See*, n.3, *supra*. In any event, Moore's claims in his amended petition are untimely. *See* discussion at III, A *infra*.

[36] ECF #29.

[37] ECF #30.

[38] ECF #31 at 3.

[39] *Id.* at 10.

As noted, Moore's third and fourth grounds for relief were added to his habeas petition by amendment originally presented on October 10, 2004.[40] The state has argued that the applicable one-year statute of limitations began to run on June 13, 2002, forty-five days after the decision of the Ohio appeals court affirming Moore's conviction. The statute ran for fifty-five days, from June 13 to August 7, 2002, the date when Moore filed a motion for a delayed appeal in the Ohio Supreme Court. The statute was tolled until April 29, 2003, which is ninety days after the Ohio Supreme Court dismissed Moore's delayed appeal. As the state notes, the statute would then have expired on March 4, 2004, well before Moore sought on October 10, 2004 to amend his habeas petition with two additional grounds.

Moore does not dispute the state's calculation of time, but argues, based on his reading of the Eleventh Circuit decision in *Walker v. Crosby*,[41] that the one-year statute of limitations should be calculated from the date of his first resentencing, not the dismissal of his delayed appeal.

Moore's interpretation of *Walker* is inapposite. As the district court in *Sykosky v. Crosby*[42] reasoned

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[40] ECF #26.

[41] *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003).

[42] *Sykosky v. Crosby*, No. 3:04CV416/MCR/EMT, 2005 WL 1334600 (N.D. Fla. June 6, 2005).

as to the same argument made by Moore here, in a holding recently affirmed by the 11th Circuit:[43]

> Petitioner's reliance on *Walker* is misplaced. In *Walker*, the Eleventh Circuit held that the statute of limitations for a habeas action that contains claims challenging the resentencing judgment as well claims challenging the original judgment of conviction begins to run on the date that the resentencing judgment became final and not the date the original judgment became final. In the instant case, Petitioner's habeas petition contains claims challenging only the original judgment of conviction; he does not challenge the resentencing judgment. Therefore, *Walker* is inapplicable.[44]

Moore is in precisely the same situation as the habeas petitioner in *Sykosky*. Moore's amended petition does not challenge any aspect of the sentencing but merely asserts claims arising from the original judgment of conviction. As such, the reasoning of *Walker* is of no avail.

Moreover, in the absence of case authority from the Supreme Court or from this Circuit, the Magistrate Judge is not persuaded that, even in more similar circumstances, *Walker* presents a solid rationale for understanding the statute of limitations in 28 U.S.C. § 2255. In *Fielder v. Varner*,[45] a Third

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[43] *Sykosky v. Crosby*, No. 05-14341, 2006 WL 1813895 (11th Cir. (Fla.) June 30, 2006).

[44] *Sykosky*, 2005 WL 1334600, at *2 (internal citation omitted).

[45] *Fielder v. Varner*, 379 F.3d 113 (3rd Cir. 2004).

Circuit opinion authored by now-Justice Samuel Alito, the court rejected the reasoning of *Walker*. Then-Judge Alito observed that requiring a habeas petition consisting of multiple claims to be considered, for purposes of applying the statute of limitations, as a single filing to be governed by a single date on which the statute begins to run, "fails on its own terms" and "neglects to pay close attention to the statutory language."[46]

In addition, Judge Alito's opinion in *Fielder* goes on to show that statutes of limitations, though often drafted in the language of a single claim, are usually applied in a multi-claim complaint on a claim-by-claim basis.[47] Further, the *Fielder* opinion notes that adopting the *Walker* interpretation would have the "strange effect of permitting late-accruing federal habeas claims to open the door for the assertion of other claims that had become time-barred years earlier."[48]

It is important to note that *Fielder* also definitively held that the language employed by an earlier panel of the Third Circuit in *Sweger v. Chesney*,[49] stating that the statute of limitations for a habeas petition applies to the whole petition and not on a case-by-case basis[50] – language cited

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[46] *Id.* at 118.

[47] *Id.* at 119. ("Although these provisions are framed on the model of the one-claim complaint, it is understood that they must be applied separately to each claim when more than one is asserted.")

[48] *Id.* at 120.

[49] *Sweger v. Chesney*, 294 F.3d 506 (3rd Cir. 2002).

[50] *Id.* at 514-15.

approvingly here by Moore[51] – was non-binding dicta.[52]

Accordingly, since Moore's habeas petition does not contain any claims arising from his sentencing, and so does not present a similar situation to that in *Walker*, the Magistrate Judge is persuaded that, even without reaching the issue of whether the limitations statute of 28 U.S.C. § 2244(d) (1) should, in petitions containing multiple claims be applied to the petition as a whole by reference to the latest timely claim, Moore's claim is time-barred since the holding in *Walker* is distinguishable.[53]

Further, should the District Court conclude that it must reach the issue of whether, as Moore argues, a habeas petition is a single entity and, by extension, its timeliness be computed by reference to the conclusion of the last collateral attack on any part of the state proceedings against the petitioner, the Magistrate Judge recommends that the Court find first that "28 U.S.C. § 2244(d)(1), like other statute of limitations provisions, must be applied on a claim-by-claim basis"[54] and that the statute of limitations here began to run again ninety days after the dismissal of Moore's delayed appeal to the Ohio

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[51] ECF #29 at 3. (Moore's filing here is not paginated and the page number provided is the computation of the Magistrate Judge.)

[52] *Fielder*, 379 F.3d at 122.

[53] *Sykosky*, 2005 WL 1334600, at *2.

[54] *Fielder*, 379 F.3d at 122.

Supreme Court[55] and without reference to his collateral attack on his sentence.[56]

Moreover, although not argued by the parties, the Magistrate Judge recommends finding that the claims of the amended petition do not escape the bar of the statute of limitations by relating back to the original, timely-filed claim. As recently stated by the Supreme Court in *Mayle v. Felix*,[57] an amendment to a habeas petition does not relate back to the original petition for purposes of the statute of limitations "when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth."[58]

Here, Moore's third and fourth claims – concerning the overruling of a request to impeach a witness with prior inconsistent statements and denying the right to challenge as impermissible hearsay the use of a police report – arise out of completely different facts from his original two claims that rest on the denial of his right to proceed *pro se*.

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[55] *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003).

[56] *Cowherd v. Million*, 380 F.3d 909, 914 (6th Cir. 2004), overruling *Austin v. Mitchell*, 200 F.3d 391 (6th Cir. 1999), quoting *Tillema v. Long*, 253 F.3d 494, 500 n.7 (9th Cir. 2001) ("[A] claim that a death row inmate is incompetent to be executed does not challenge the validity of the judgment, but only its execution." Holding that federal habeas statute of limitation applicable to the judgment is not tolled by a state collateral attack in terms of sentence.).

[57] *Mayle v. Felix*, __ U.S. __, 125 S. Ct. 2562 (2005).

[58] *Id.* at 2566.

By any analysis, the Magistrate Judge recommends that Moore's third and fourth grounds for relief be dismissed as time-barred.[59]

B. Ground one – deprivation of the right to self-representation

1. Claim and response

Moore asserts that the trial court, acting contrary to his Sixth and Fourteenth Amendment rights of self-representation, "failed to make the appropriate inquiry into Petitioner Moore's request to represent himself, which resulted in insurmountable prejudice to Petitioner Moore."[60]

The state responds by contending that the trial court acted in accordance with the holding of *McKaskle v. Wiggins*[61] and that in so doing the state appeals court reasonably applied the clearly established federal law to this case.[62]

2. General principles of habeas analysis

Under the well-known rule of *Williams v. Taylor*,[63] a habeas petitioner is entitled to relief only if a state court acted in a manner that was either contrary to, or involved an unreasonable application of, clearly established federal law as determined by

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[59] Moore has not argued that he is entitled to equitable tolling and, in any event, he does not appear to be eligible for such relief here. *See, Dunlap v. United States*, 250 F.3d 1001 (6th Cir. 2001).

[60] ECF #1, Ex. 2 at 5-6.

[61] *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

[62] ECF #16 at 9-10.

[63] *Williams v. Taylor*, 529 U.S. 362 (2000).

the Supreme Court of the United States.[64] Where the state panel recognized the correct applicable federal law, inquiry by the habeas court proceeds under the rubric of whether the state court unreasonably applied the federal law.[65] The proper habeas inquiry in such a case is whether the state finding was "objectively unreasonable" and not simply erroneous or incorrect.[66]

Where the state court did not identify any clearly established federal law in rendering its decision, the habeas court will first identify the clearly established federal law applicable to the matter and then determine if the state decision was contrary to that law by either contradicting the holding in a Supreme Court case or arriving at a substantially different result on materially indistinguishable facts.[67]

3. Self representation – the clearly established federal law

As the Sixth Circuit recently observed in *Jones v. Jamrog*,[68] "the universe of clearly established federal law [concerning self-representation] as determined by the Supreme Court, 28 U.S.C. § 2254(d)(1), is narrow. It consists of one decision, *Faretta v. California*,[69] the leading Supreme Court decision to reach a holding on the Sixth Amendment

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[64] *Id.* at 404.

[65] *Id.* at 407.

[66] *Id.* at 409-11.

[67] *Id.* at 405-06.

[68] *Jones v. Jamrog*, 414 F.3d 585 (6th Cir. 2005).

[69] *Faretta v. California*, 422 U.S. 806 (1975).

right of self-representation at trial."[70] *Faretta* holds, *inter alia*, that the choice to represent oneself is:

> at once a choice to exercise an independent Sixth Amendment right, the right to represent oneself, and a choice to forgo another Sixth Amendment right, the right to counsel, and therefore is, in part, a waiver, and must be made knowingly, intelligently, and voluntarily.[71]

Hence, the right to proceed *pro se* and the right to be represented by counsel are viewed as correlative rights in that the assertion of the former necessarily constitutes waiver of the latter.[72] For that reason, courts have prescribed that the trial court conduct an inquiry of a criminal defendant seeking to proceed *pro se* as to whether he is aware of the consequences of waiving his right to counsel[73] and, further, mandated that the trial judge make a finding on the record that the defendant has knowingly waived his right to counsel.[74] Because the right to counsel is so fundamental, a habeas court will "indulge every reasonable presumption against" finding a waiver of the right to counsel.[75]

However, such an inquiry and findings on the record by the trial court are only required where a

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[70] *Jones*, 414 F.3d at 591.

[71] *Faretta*, 422 U.S. at 835.

[72] *United States v. Cromer*, 389 F.3d 662, 680 (6th Cir. 2004).

[73] *Faretta*, 422 U.S. at 835; *Cromer*, 389 F.3d at 682.

[74] *See, United States v. McBride*, 362 F.3d 360, 366 (6th Cir. 2004).

[75] *Fowler v. Collins*, 253 F.3d 24, 249 (6th Cir. 2001).

criminal defendant has clearly, unequivocally, and timely asserted his right to proceed *pro se*.[76] Mere expressions of dissatisfaction with counsel will not be interpreted as a request to proceed *pro se*,[77] and trial courts have no obligation to notify defendants of the right to proceed *pro se*.[78]

In addition, once a *pro se* criminal defendant has invited or agreed to any substantial representation by counsel, the presumption is that such representation by counsel is with the defendant's consent.[79]

4. The state appeals court decision

The appeals court here denied the self-representation claim with the following analysis:

> Although defendant told the court in his letter that he wished to proceed *pro se*, he then took the stand and allowed his counsel to conduct direct examination of him. Thus, although he requested permission to proceed *pro se* in his

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[76] *Cromer*, 389 F.3d at 682-83 (requiring an "articulate and unmistakable demand to proceed *pro se*" before mandating the *Faretta* inquiry); *United States v. Martin*, 25 F.3d 293, 295-96 (6th Cir. 1994), ("Even where the right to self-representation is clearly invoked, it must be done so in a timely manner. *** [Denial of motion to proceed *pro se*] made after the trial was in full swing, is a *fortiori* a proper exercise of discretion.").

[77] *Martin*, 25 F.3d at 296. ("Where a defendant merely expresses dissatisfaction with trial counsel's performance, as did Martin, we will not interpret this as a motion to proceed pro se; instead it will be understood as an appeal to the trial court's discretion to substitute counsel.")

[78] *Id.*

[79] *Wiggins*, 465 U.S. at 183.

> letter to the court, he immediately contradicted his request by having his attorney continue to defend him. This "subsequent appearance[] by counsel must be presumed to be defendant's acquiescence ***.[80]

The state appeals court, therefore, did not analyze whether the trial court properly handled Moore's request to represent himself under the clearly established federal law announced in *Faretta*.[81] Rather, it focused on whether Moore waived his right to self-representation under Wiggins.[82]

5. Application of the clearly established federal law

a. Outline of analysis

The conclusion of the state appeals court that the trial judge conducted an adequate review of Moore's request to represent himself and then that Moore waived that right to self-representation presents two structural barriers to meaningful review. First, the court did not identify each step of the process by which the right to self-representation may be asserted, claimed and waived. Next, it failed to make separate findings as to how those steps were specifically accomplished in Moore's case. Consequently, it is necessary here to first delineate the sequence by which the right to self-representation is claimed and waived and, then

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[80] *Moore*, 2002 WL 664104, at *5, quoting *Wiggins*, 465 U.S. at 183.

[81] *Faretta*, 422 U.S. 806.

[82] *Wiggins*, 465 U.S. 168.

applying that law to the facts in this record, to determine if the ultimate holding of the state appeals court was an unreasonable application of the law.

Essentially, three distinct steps are required to reach the ultimate holding of the state court. First, Moore must be found to have made a clear, unambiguous and timely assertion of his right to self-representation. Second, Moore's assertion must have been examined by the trial court and a conclusion reached, discernable from the record, that such a request was a knowing and voluntary waiver of the related right to be represented by counsel, and that Moore was authorized to proceed *pro se*. This step is in two parts: the first being the waiver and the second being granting the motion for self-representation when the request is made. Finally, any subsequent waiver by Moore of his right to self-representation must also be knowing and voluntary as reflected by the record.

Accordingly, these steps, and the factual support for concluding that they were or weren't followed here, will be addressed individually.

b. Step one – the clear, unambiguous, and timely assertion of the right to self-representation

As noted, the right to self-representation must be asserted in a clear, unambiguous, and timely manner.[83] Mere expressions of dissatisfaction with counsel will not be interpreted as a request for self-representation but will be seen as an appeal to the

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[83] *See*, cases cited at n.76, supra.

trial court's discretion to substitute counsel.[84] Nor is an assertion of the right to self-representation made after a trial has commenced beyond the authority of the trial court to accept or deny at its discretion.[85]

Thus, it is the clear assertion of the right to self-representation that triggers the requirement that the trial court conduct the *Faretta* inquiries to establish that a litigant wishing to proceed *pro se* is thereby knowingly and voluntarily waiving his right to representation by counsel.[86] It is further the clear unambiguous assertion of such right during a trial that places the matter within the sound discretion of the trial court.[87]

Although it did not specifically find that Moore made a clear, unambiguous, and timely request for self-representation, the state appeals court did find that Moore "told the court in his letter that he wished to proceed *pro se*."[88] While that statement is a mixed conclusion of law and fact and so not binding on a federal habeas court,[89] the Magistrate Judge recommends finding that Moore's letter did constitute a clear and unambiguous request for self-representation.

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[84] *Martin*, 25 F.3d at 295-96.

[85] *Id.*

[86] *Cromer*, 389 F.3d at 682-83.

[87] *Martin*, 25 F.3d at 296 (denial of a motion to proceed *pro se* "made after the trial is in full swing, is a *fortiori* a proper exercise of discretion.").

[88] *Moore*, 2002 WL 664104, at *5.

[89] *Thompson v. Keohane*, 516 U.S. 99, 109-10 (1995).

The letter, which is reproduced in full in the state appeals court opinion,[90] was written by Moore at the specific request of the trial judge.[91] The judge, at the conclusion of an on the record colloquy with Moore about his complaints concerning his trial counsel, had told Moore he would "entertain the thought" of Moore representing himself,[92] instructing him to make the request for self-representation as "a written motion if you want to do so over this lunch period and explain to me your plans for trial, your strategy and – not specific, but your general capacity for conducting a trial."[93]

In his letter, Moore methodically proceeds through a series of possible solutions to his difficulties with counsel, each new proposal contingent on the unavailability of the prior one. Moore begins by re-stating his basic complaint that he is "in a position to watch but not participate, to witness but not contribute...."[94] As his first remedy, Moore proposes that he be permitted to "assist [defense counsel] Bob Tobick to the best of my abilities...."[95] But, Moore goes on to state, "if my contributions will be continueously [sic] ignored then

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[90] *Moore*, 2002 WL 664104, at *3.

[91] *Id.* (Notation following signature and date that it was "Written on direction of judge Honorable Timothy McGinty.")

[92] ECF #20 at 1196.

[93] *Id.*

[94] *Moore*, 2002 WL 664104, at *3.

[95] *Id.*

I would ask that you allow him to assist me in continueing [sic] my defense."[96]

Proceeding through his sequence of contingencies, Moore then states that "[i]f that cannot be accomplished, then I would ask that you recall past witnesses and they be asked Q's I deem relevant...."[97] Finally, Moore concludes by stating:

> If none of the before mentioned requests can be granted[,] I ask that you read this entire document into the record and you allow me to proceed pro se after a reasonable continuance (48 hrs.)....[98]

Moore concluded his letter by apologizing to the court for "any inappropriate behavior in the courtroom" and requesting an opportunity to "apologize to [the] jury and [so that] they be made fully aware of why the earlier incident took place and the resolution [that was] decided upon and why."[99]

Although the trial judge professed to be confused as to whether this letter did represent a clear, unambiguous, and timely request by Moore for self-representation,[100] the state appeals court, as noted, did state that Moore "requested to proceed *pro*

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[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at *4 (to defense counsel, "He wants to and he later says he would like to go *pro se*, but I'm not sure;" to Moore, "I read [your letter] after you got on the witness stand Mr. Moore, and you have asked a couple of things. I'm not sure what you want . . . .").

se in his letter to the court...."[101] In addition, making the request for self-representation as the final contingency in a series of possibilities is not fatal to finding that it is clear and unambiguous.[102]

The Magistrate Judge accordingly recommends finding that this letter was a clear, unambiguous request by Moore to represent himself. The conclusion by the state appeals court to this effect should, therefore, be seen to be not an unreasonable application of clearly established federal law.

Further, as to timeliness, the third initial attribute of a valid request for self-representation, the state appeals court observed that there is no requirement that a request to proceed pro se be made prior to the commencement of trial.[103] This is fully in accord with well-established federal law that permits the granting of a request for self-representation within the discretion of the trial judge.[104]

Accordingly, the Magistrate Judge recommends finding that the implicit conclusion of the state appeals court that Moore, by his letter to the trial judge, did make proper, conditionally timely request for self-representation, is not an unreasonable application of clearly established federal law.

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[101] *Id.* at *5.

[102] *See, Jones*, 414 F.3d at 592-93.

[103] *Id.* at *4.

[104] *Martin*, 25 F.3d at 296.

In sum, the Magistrate Judge recommends finding that the state court did not unreasonably apply clearly established federal law in finding that Moore made a clear, unambiguous, and timely request for self-representation, contingent upon the exercise of the trial court's discretion.

c. Step two – waiver of the right to counsel and acceptance by the trial court of the motion for self-representation made during trial

The inquiry would now normally proceed to whether the state appeals court reasonably applied clearly established federal law in evaluating whether the trial court (a) properly recorded a knowing and voluntary waiver by Moore of his right to counsel and then (b) properly exercised its discretion in accepting or rejecting Moore's motion to represent himself made during the course of his trial.

However, because the trial court here conspicuously failed to take any action on Moore's motion, and because the state appeals court did not recognize the presence of the issue of what a trial court must do in addressing a request to proceed *pro se* made during trial, it must now be considered *de novo*, and the implicit conclusion of the state appellate court that this step was properly taken at trial be considered in light of whether it is contrary to clearly established federal law.

The state appeals court examined the trial court's actions after Moore tendered his letter requesting the right to self-representation in light of the rubric set forth in the Ohio case of *State v.*

Deal.[105] The appeals court criticized the trial court's "manner of handling [Moore's] request" as "less than effective," but ultimately concluded the trial judge had "technically complied with the requirements of *Deal*..."[106]

The Magistrate Judge notes that *Deal* is inapposite to the present matter.[107] *Deal* prescribes what must be done when, during the course of a trial, "an indigent accused *questions the effectiveness and adequacy* of assigned counsel...."[108] As the Sixth Circuit in Martin makes clear, the mere act of questioning counsel's performance is not to be understood to be a request to proceed *pro se*, and so trigger the inquiries mandated by *Faretta*, but "will be understood by the trial court as an appeal to the court's discretion to substitute counsel."[109]

Thus, by grounding its analysis on *Deal*, the state appeals court incorrectly found itself examining what steps must be taken by a trial court to safeguard the limited right of an indigent accused to

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[105] *State v. Deal*, 17 Ohio St. 2d 17, 244 N.E.2d 742 (1969).

[106] *Moore*, 2002 WL 664104, at *5.

[107] It should be noted that on appeal Moore framed a related issue to the one asserting error for denying him his right to self representation exactly as the state court did concerning the issue of self-representation, as one involving the failure of the trial court to make timely inquiry into his complaints about counsel, citing *Deal* and *State v. Prater*, 71 Ohio App. 3d 78, 593 N.E.2d 44 (1990. *See*, ECF #18 at 32. If the state appeals court mistakenly conflated these arguments, it would explain the inapposite use of *Deal* to this claim.

[108] *Id.* at *4, quoting the syllabus in *Deal* (emphasis added).

[109] *Martin*, 25 F.3d at 296.

have appointed counsel that one prefers[110] as against the more robust procedures *Faretta* mandates when dealing with the fundamental right to represent oneself.[111]

Therefore, the Magistrate Judge recommends finding that the state appeals court here did not correctly identify what was at stake when the trial judge undertook a review of Moore's request[112] and so did not subject the review of that request to the proper clearly established federal law.

The request to represent oneself inherently involves a waiver of the right to counsel. As has been previously noted:

> This choice is at once a choice to exercise an independent Sixth Amendment right, the right

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[110] *See, e.g., United States v. Saldivar-Trujillo*, 380 F.3d 274, 277 (6th Cir. 2004) ("An indigent defendant has no right to have a particular attorney represent him and therefore must demonstrate 'good cause' to warrant substitution of counsel.").

[111] *Faretta*, 422 U.S. at 834. ("It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'") (Quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring).)

[112] The state appeals court did, as noted, correctly find that Moore had requested self-representation, but then, apparently, mistakenly concluded that a request for self-representation was equivalent to a request to substitute counsel, requiring only a response from the trial court suitable to a request to change appointed counsel. *See, Moore*, 2002 WL 664104, at *6 ("Although we override this assignment of error, the trial courts are advised to seriously and properly address defendants' requests to change counsel or proceed *pro se*.").

> to represent oneself, and a choice to forgo another Sixth Amendment right, the right to counsel. The choice, therefore, is in part a waiver and thus must be made knowingly, intelligently, and voluntarily.[113]

Thus, once the request for self-representation has been made clearly and unequivocally, the next step is to determine if the party requesting self-representation is thereby "knowingly, intelligently and voluntarily" waiving his right to counsel.

In *King v. Bobby*,[114] the Sixth Circuit recently held that while an extensive pre-waiver colloquy consisting of a series of specific questions from the court to the party wishing to proceed *pro se* is "required by this Circuit it is not required by the Supreme Court."[115] Instead, *King* held that the core holding of the Supreme Court is that a person wishing to represent himself must do so by "a knowing and intelligent waiver," and the presence of that waiver may be found by examining the whole record.[116]

Here, despite serious flaws in the trial court's colloquies with Moore on the issue of self-representation, including misstatements of key points of law,[117] there are arguably present in the

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[113] *Jones*, 414 F.3d at 592, quoting *Faretta*, 422 U.S. at 835.

[114] *King v. Bobby*, 433 F.3d 483 (6th Cir. 2006).

[115] *Id.* at 492.

[116] *Id.*

[117] *See, e.g.*, "It's too late for [self-representation] now. You've already started with an attorney. I don't believe you can go mid-trial." ECF #20 at 1195-96. *See also*, "[If you were to

whole record the elements of a knowing and intelligent waiver by Moore of the right to counsel,[118] despite the fact that the state appeals court made no finding in this regard. However, in view of the fact that the trial court completely failed to rule on Moore's motion to represent himself made during trial and, thus, committed to the court's discretion, the Magistrate Judge recommends that it be found unnecessary to address the question of whether the necessary elements of a waiver of the right to counsel exist in the total record.

Specifically, the trial judge correctly recognized, despite his prior observation that he did not believe a request for self-representation could be made during trial, that any request for self-representation made during the trial would need to be in the form of a motion to the court and that exercising that right would be subject to the court's sound discretion.

Accordingly, the trial judge told Moore that he would "entertain the thought" of his representing himself. Moore was told on the record, "[i]f you want to put it in writing over the lunch hour, I will ... allow you to make a written motion...."[119]

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proceed *pro se*] [y]ou would be waiving final argument because you would be incapable of presenting what a *pro se* final argument would have to be." *Id.* at 1196-97.

[118] *See, e.g.*, Moore was aware of his right to counsel, ECF #20 at 1194; and was aware of potential serious consequences of self-representation, although some of the noted consequences were erroneous, *id.* at 1194-97.

[119] *Id.* at 1196 (emphasis added).

Moore did so, preparing a written request to represent himself, which he made a point to note was done at the request of the trial judge.[120] Moore's attorney told the trial court at the conclusion of testimony for the day the letter was written that he would review the letter with Moore and ask that it be included in the record the next morning.[121] The trial judge agreed, stating that "we'll talk about it in the morning. Before we start, remind me about it."[122]

Moore's counsel did as he was instructed and reminded the trial judge at the opening of court the next day that he still needed to rule on Moore's motion.[123] The trial judge simply told Moore's attorney to "send [the letter] up when you find it. That's all."[124] At that point, without ruling on Moore's pending motion for self-representation, the trial judge resumed the trial with Moore taking the stand to be examined by his existing attorney in his own defense.

Shortly thereafter, during an on the record sidebar discussion on an evidentiary objection, the trial judge brought up the subject of Moore's letter. The court expressed the belief to Moore's attorney that Moore was "vascillat[ing]" as to whether he wished to represent himself as he had expressed the previous day during the colloquy.[125] The trial judge

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[120] *Moore*, 2002 WL 664104, at *3.

[121] ECF #20 at 1285-86.

[122] *Id.* at 1286.

[123] ECF #21 at 1291.

[124] *Id.*

[125] *Id.* at 1305.

stated that, "He doesn't specifically ask to take over his own defense."[126]

Moore's attorney immediately sought to correct the court concerning Moore's intent to represent himself as expressed in the letter.[127] "I think he does. He wants to take over from that point."[128] Critically, the trial judge then raised the point that Moore's taking the stand that morning could be an abandonment of any previously expressed wish to proceed *pro se*. "[H]e got up on the witness stand so I don't know if that's an abandonment of what he just gave me before hand or what."[129] This comment is despite the fact that Moore had not received any ruling on his motion when he took the stand. The trial judge concluded his remarks by stating that he would delay a ruling on Moore's request for self-representation yet again. "We will inquire of him later on again to see where he is at."[130]

The trial then resumed, with Moore continuing to answer questions posed by his attorney. During a break, the trial judge did address Moore on the record outside of the presence of the jury about his letter:

> Now, the court received your letter here this morning. *I read it after you got on the witness stand*, Mr. Moore, and you have asked

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[126] *Id.* at 1306.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 1307.

> a couple of things. I'm not quite sure what you want, but you wanted a chance to address the jury. The court would certainly give you that. You had the chance. Your attorney asked if there is anything you wanted to say. ***You gave your statement. That is what you are looking for.***[131]

These remarks by the trial court establish that Moore's written motion for self-representation, prepared at the explicit direction of the trial judge, was not even considered prior to trial resuming with Moore assuming the witness stand. Moreover, the trial court here once again expressed confusion over the import of Moore's motion – which, it should be recalled the state appeals court in review found was a clear, unambiguous request for self-representation – and reduced Moore's letter to simply a request to make a statement to the jury, something which Moore had already done.[132] After misconstruing the motion, the trial court told Moore, "You gave your statement. That is what you are looking for."[133]

While appearing here to dispose of the misconstrued motion as moot, the trial court did not clearly indicate to Moore that his written motion to represent himself was denied.

The court then had a brief discussion with counsel and Moore as to whether Moore would apologize to the jury in the form of a statement or as

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[131] *Id.* at 1375 (emphasis added).

[132] *Id.*

[133] *Id.*

the answer to a question.[134] The court stated it was indifferent to what was decided in this respect.[135] Moore's counsel then began to speak, but was interrupted by the trial judge finishing his remarks bout the form of Moore's apology to the jury. "So you talk it over and whatever you want to do [regarding the form of the apology], that's fine. Okay. Have a nice break here."[136]

In the end, Moore's written motion, which was discussed by the trial court at this conference only to the limited degree that it expressed a desire to apologize, was never discussed again on the record. No ruling on Moore's written motion to represent himself was ever put on the record.

While, to be sure, neither Moore nor his counsel were continuously insisting that the trial judge rule on Moore's written motion for self-representation, Moore's attorney did attempt to correct the trial court when it sought to mis-characterize the motion as confusing or contradictory.[137] Moore, in turn, who had been warned by the trial judge about his "[un]willingness to comply with orders of the court,"[138] even to the point of chiding him for his lack of "basic politeness,"[139] may reasonably be assumed to have been being careful not to anger the judge any further

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[134] *Id.*

[135] *Id.* at 1375-76.

[136] *Id.* at 1376-77.

[137] *See, id.* at 1306.

[138] *Id.* at 1196.

[139] *Id.*

by seeking to remind him to rule on his pending motion. Most importantly, in the end, the record shows that it was the trial court that displayed a troubling tendency to repeatedly mis-read the motion and to then routinely put off any consideration of it.

The Magistrate Judge suggests that this failure to afford Moore any meaningful consideration of his clear, unambiguous, and potentially timely request to exercise his fundamental constitutional right to self-representation – a request Moore could not exercise on his own because doing so was within the discretion of the trial court since it was made during the trial – precludes recommending that the appeals court reasonably applied *Faretta* here by concluding that the trial court "technically complied" with *Dean*.

> *d. Step three – because Moore's right to self-representation had not attached, since it was asserted during trial and thus dependent for its execution on the discretion of the trial court, which had not ruled to either grant or deny Moore's request, Moore cannot be said to have waived something he did not have.*

Since exercising a right to self-representation asserted during trial depends upon the approval of the trial court in its discretion, a finding that such a right was subsequently waived depends upon it having been previously effectuated. Thus, any waiver in this case would depend upon Moore having been first granted the right to represent himself by the trial court, and then, "knowingly, intelligently

and voluntarily,"[140] having done or said something to waive that right.

A pre-condition to a waiver being "knowing, intelligent and voluntary" must be that the actor is aware of the what is being waived. This central point appears to lie behind the inquiries mandated by *Faretta*. Therefore, if the right to defend *pro se* and the right to counsel are "two faces of the same coin,"[141] and if the inquiries mandated by the Sixth Circuit in applying *Faretta*[142] begin with inquiries focused on making clear that the party seeking to relinquish the right to counsel does presently have that right, then establishing from the record that a party allegedly waiving his right to self-representation actually knew that he was in possession of that right at the time of the purported waiver seems to be required.

Further, being able to locate in the record some evidence that the party allegedly waiving the right to self-representation knew he currently had that right would protect against an inadvertent waiver.[143]

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[140] *See, Jones*, 414 F.3d at 592. A choice that includes a waiver "must be made knowingly, intelligently and voluntarily" (quoting *Faretta*, 422 U.S. at 835).

[141] *Cromer*, 389 F.3d at 680 (quoting *United States v. Conder*, 423, F.2d 904, 908 (6th Cir. 1970)).

[142] *Id.* citing to *1 Bench Book for United States District Judges* 1.02-02 to -5 (3d ed. 1986).

[143] *See, id.*, citing *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989) which discussed the analogous situation of a locating an unequivocal assertion of the right to self-representation and thus a clear waiver of the right to counsel as a protection

McKaskle v. Wiggins,[144] the case cited by the state appeals court and here by the state in support of the proposition that Moore waived his right to proceed *pro se* when he took the stand and permitted his counsel to examine him, is not contrary to the position being suggested here.

Wiggins requested the right to proceed *pro se* before his second trial, after he had done so with the court's permission during the first trial.[145] As the Supreme Court noted, Wiggins filed and argued twelve pretrial motions pro se; conducted the voir dire pro se; filed numerous trial motions pro se; cross-examined witnesses and raised objections pro se; filed his own requests for jury instructions; and, made his own objections to the proposed jury charge.[146]

Thus, when Wiggins relinquished control of the trial to standby counsel, the Supreme Court did not need to seek further evidence that Wiggins had – and knew he had – possession of his right to self-representation at the time he took the actions that the Court found constituted a waiver of that right.

There is plainly no such record here. The conclusion of the state appeals court that Moore, by permitting his counsel to examine him, thereby waived his right to self-representation does not, in the view of the Magistrate Judge, have an adequate

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against finding an inadvertent waiver from defendant's "occasional musings on the benefits of self-representation."

[144] *Wiggins*, 465 U.S. 168.

[145] *Id.* at 170-71.

[146] *Id.* at 175.

foundation in the record. Moore, when he took the stand, did not know he possessed the right he was seeking. In fact, he knew only that he had asked for that right and that the trial court was reviewing his request.

Further, characterizing Moore's action here as a waiver becomes even more difficult when it is recalled that the trial judge admitted that Moore took the stand prior to the judge even reading Moore's request, let alone ruling on it. Requiring Moore to have refused to take the stand until his request for self-representation was ruled on would have put Moore in the position of potentially provoking the trial judge who had just recently scolded him for his inability to follow the court's orders. Moreover, Moore's attorney had been told by the trial judge immediately prior to Moore's testimony to "send up" Moore's motion to the bench where, presumably, the court would read it and rule on it. There was no hint that testifying would be prejudicial to the motion, let alone be construed as a waiver. That notion from the trial judge only surfaces after Moore has already commenced testifying.

Accordingly, the Magistrate Judge recommends finding that Moore's testimony after he sought the right to self-representation – but before that motion had been ruled on, or even considered – did not constitute a "knowing, intelligent and voluntary waiver" of that right, and so further recommends that the conclusion of the state appeals court to the contrary be deemed to be an

unreasonable application of the clearly established federal law of *Wiggins*.

C. Ground two – deprivation of the right to effective assistance of counsel

Moore asserts that he was denied the effective assistance of counsel when the state trial court failed to make an adequate and timely inquiry into Moore's complaints concerning his appointed counsel.[147] The state responds by asserting that Moore has not presented specific errors that he claims were committed by counsel[148] and that the state appeals court reasonably applied *Strickland v. Washington*[149] in concluding that Moore did not establish a "reasonable probability that a different [trial] strategy would have achieved a contrary result."[150]

The state appeals court did not treat the issue as a matter involving a claim of ineffective assistance of counsel, to be resolved according to the analysis established in *Strickland*, but as a question of when a duty attaches to a trial judge to inquire of an indigent defendant concerning his claims concerning

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[147] ECF #1, Ex. 2 at 13-18.

[148] ECF #16 at 10 ("Moore contends that he was deprived of the effective assistance of counsel as a consequent of errors which Moore deems unworthy of identification."); ("Moore brands counsel as ineffective for reasons that 'would have been discovered' had the trial judge conducted a 'proper' inquiry."), *id.* at 12.

[149] *Strickland v. Washington*, 466 U.S. 668 (1984).

[150] ECF #16 at 13.

the "adequacy and effectiveness of assigned counsel."[151]

Moore presented this issue to the state appeals court as solely involving the failure of the trial court to make an adequate and timely inquiry of his complaints, mostly relying on the Ohio state decisions of *Deal* and *State v. Prater*.[152]

Essentially, the first issue before the habeas court is to determine specifically what constitutional violation Moore is alleging in this ground for relief. It appears from both his current petition and his argument to the state court that the gravamen of this ground for relief is the failure of the trial court to inquire into his complaint and not any specifically deficient actions by his attorney which might be reviewed by a *Strickland* analysis.

An indigent defendant complaining about appointed counsel intersects with the Sixth Amendment in two possible ways. First, as discussed previously, it may involve a defendant's right to waive his right to counsel and represent himself.[153] Second, it may involve a request for the appointment of new counsel[154] or the substitution of

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[151] *Moore*, 2002 WL 664104, at *4, quoting *Deal*, 17 Ohio St. 2d 17.

[152] *Prater*, 71 Ohio App. 3d 78, 593 N.E.2d 44, cited in ECF #18 at 32 (Moore's brief on appeal). Moore also cited the state court, *inter alia*, to *Sawicki v. Johnson*, 475 F.2d 183 (6th Cir. 1973) and two other federal court opinions.

[153] *See, Faretta*, 422 U.S. 806.

[154] *See, Saldivar-Trujillo*, 380F.3d at 277.

retained counsel.[155] Accordingly, the constitutional right involved, which would require a timely hearing by the trial judge, would be the right to self-representation, which has already been addressed, or the right to change counsel.

As to the situation of a defendant seeking to waive his right to counsel and represent himself, that has been previously addressed. As to the situation where a defendant seeks to change counsel, either by substituting a new appointed counsel or by replacing the appointed counsel with retained counsel, it should be noted that neither situation obtains here. Moore has not argued here or to the state court that he wished to substitute a new appointed counsel or to retain his own counsel.

Rather, Moore has consistently argued that he was impermissibly denied his right to represent himself. By this second ground for relief, Moore attempts to create a second, independent constitutional claim of "failure to inquire into complaints concerning counsel" out of the fundamental facts of his first ground for relief. Again, the right to a timely and adequate hearing concerning a defendant's complaints about counsel is not an independent right, but is part of the process by which a court determines if such complaints reveal an adequate foundation for one of the only two actions a court is empowered to take: either permitting the defendant to elect his right to self-

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[155] *Serra v. Michigan Dept' of Corrs.*, 4 F.3d 1351 (6th Cir. 1993).

representation or to permit existing counsel to withdraw and new counsel to assume representation.

Moore's attempt here to conflate the requirement for a hearing in such circumstances with the *Strickland* analysis appropriate to reviewing specific allegations of deficient performance does not create a new constitutional right to a timely hearing during the course of trial by which a trial court can instruct existing counsel on new strategy or tactics more to the liking of the defendant. If a defendant believes his counsel is deficient and brings that to the court's attention during trial, the result must either be the waiver of the right to counsel and assertion of the right of self-representation or the substitution of new counsel.

Moore did clearly indicate to the trial court which option he sought. That claim was analyzed above and the present argument, as it restates the first, is moot.

Accordingly, the Magistrate Judge recommends that ground two of Moore's petition be dismissed as moot.

Conclusion

For the foregoing reasons, the Magistrate Judge recommends that Moore be granted a conditional writ, subject to being re-tried by the state.

Dated: July 27, 2006

s/ William H. Baughman, Jr.
United States Magistrate Judge

Objections

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.[156]

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[156] *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also, Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

APPENDIX E

THE SUPREME COURT OF OHIO

Case No. 02-1351

State of Ohio,

Appellee,

v.

John Moore, Jr.,

Appellant.

ENTRY
Filed January 29, 2003

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal.

COSTS:

Docket Fee, $40.00, paid by Akron University Law School Clinic Program.

(Cuyahoga county Court of Appeals; No. 78751)

s/Thomas J. Moyer
Chief Justice

APPENDIX F

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 78751

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN MOORE, JR.

DEFENDANT-APPELLANT

DATE OF ANNOUNCEMENT OF DECISION:
April 18, 2002

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court, Case No. CR-392440.

JUDGMENT: Conviction affirmed; imposition of consecutive sentences is reversed and remanded for resentencing.

DATE OF JOURNALIZATION: April 29, 2002

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON, ESQ.
Cuyahoga County Prosecutor
MARK J. MAHONEY, ESQ.
Assistant County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant:

ROBERT M. INGERSOLL, ESQ.
Assistant Public Defender
100 Lakeside Place
1200 West Third Street
Cleveland, Ohio 4113-1569

TIMOTHY E. McMONAGLE, A.J.:

Defendant-appellant, John Moore, Jr., appeals his conviction for aggravated robbery and two counts of kidnapping, al with firearm specifications. He also appeals his maximum and consecutive sentences.

Defendant and his accomplice arrived very early one Sunday morning at the Hard Rock Cafe in Tower City. They told the night cleaner who let them in that they were there to interview for jobs. They proceeded to the "safe room" where the kitchen manager was finishing counting money. When defendant's accomplice held a gun to her head, the manager opened the safe and gave him the paper money. Moore demanded she give him the coins as well. The accomplice then left the room and returned with another female employee. The men proceeded to tie up both women with duct tape. They also gagged the employee with tape but left the manager without a gag when she told him she had allergies and would choke if she were gagged.

After the men left, the women managed to free themselves and called the police. The manager supplied the police with a surveillance tape of the robbers, but because the tape had been reused so many times the quality of the pictures was poor.

After NASA enhanced the tapes, still pictures were taken from them which showed defendant in a distinctive baseball cap.

Several days prior to this robbery, a private home had been robbed and its occupant also had been bound and gagged with duct tape. Defendant's accomplice, Lamar Chaney, was identified in a line-up as one of the perpetrators in the private home robbery. The accomplice was then identified by the manager, employee, night cleaner and fourth employee as one of the robbers at the Hard Rock Cafe.

The detectives questioned one of the accomplice's co-defendants, Trent Willis, from the private home robbery, who led the police to defendant's home. The police searched defendant's home and later questioned him. Defendant signed a written confession to the Hard Rock Cafe robbery. The police also took a photo of defendant in the distinctive cap from defendant's home. Finally, an analysis of phone records corroborate all the details contained in defendant's confession.

Appellant's initial appeal stated four assignments of error. After this court granted him leave to supplement his appeal, he stated four additional assignments of error.

For his first and second assignments of error, defendant states:

> I. THE TRIAL COURT DEPRIVED JOHN MOORE OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF

COUNSEL, WHEN IT FAILED TO MAKE AN ADEQUATE INQUIRY INTO MR. MOORE'S COMPLAINT THAT HIS TRIAL COUNSEL WAS NOT DOING AN ACCEPTABLE JOB AND HAD MR. MOORE PROCEED IN THE TRIAL WITH THE SAME ATTORNEY.

II. THE TRIAL COURT ERRED AND DENIED JOHN MOORE HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WHEN IT OVERRULED HIS MOTION TO WAIVE COUNSEL AND REPRESENT HIMSELF.

Defendant argues that when the trial court refused to hear his complaints about the trial tactics of his attorney and either appoint another attorney or allow him to proceed *pro se*, he was denied effective assistance of counsel. The state counters that because defendant did not raise this issue until the state had nearly finished its case in chief, the request was untimely and the court properly denied it.

On September 14th, after several days of trial, immediately following a break in which the attorney was instructed to discuss whether or not a certain witness should be called, defense counsel approached the bench and stated,

> my client has given me a request of instructions and I have informed him that this is not the appropriate time to place this on the

> record. And I'm telling the court that I would like time after the State's case and before our case, but he has some things which I think they are perhaps dissatisfaction [*sic*] with the way I'm representing him that he would like to tell the court or have me tell the court.
>
> THE COURT: Well, that's all very nice. You know, we will certainly take that all into account. Thank you. Let's go.

The court then tried to proceed with trial, but defendant repeatedly interrupted. He stated, "I asked [my attorney] to deliver a letter. I don't think he gave it to you." The court informed him that it was not the appropriate time for this discussion, to which defendant replied, "Excuse me, your Honor, before we start up, I want to make sure I preserve--." The court interrupted him and told him not to speak in front of the jury. The court then said "When we are a break, we will have another--." Defendant then interrupted the court and said, "we were at a break. He handed you a note."

Following discussion of the events of a trial of a co-defendant, the court informed defendant that he could say whatever he wanted when he testified. Defendant attempted to clarify that "[t]hese are questions for witnesses that were already here." The court told him to be quiet and that he could say anything he wanted to on the witness stand.

Defendant responded, "I'm trying to communicate with the court but nobody is letting me." The court again ordered him to stop speaking until the jury was no longer in the room.

Later that day, the court spoke on the record with the defendant outside the presence of the jury. Defendant again explained that his attorney was not asking questions he considered necessary for his defense and that he had written a note to the judge informing him of it. The judge acknowledged that he had not seen defendant's note and told defendant that although he could suggest questions to his counsel, counsel "is the one who makes that decision as to the specifics of the questions and witnesses."

Defendant asked, "then what do I have to do to make a decision on what questions are asked and who's called and not called? What do I have to do right now to do that because I feel that I have some very important questions that are not being asked." The court responded by telling him first that his court-appointed counsel was very qualified and "is highly respected in the community."

The court went on to tell him, "[n]ow you could have hired your own attorney or you can go *pro se* and be your own attorney ***." He then discouraged defendant from going *pro se*. Nevertheless, defendant then asked repeatedly to go *pro se*.

The court first told him "[i]t is too late for that now. You have already started with an attorney. I don't believe you can go mid trial." Tr. at 844. The court also stated that defendant had not "demonstrated any knowledge of the law or willingness to comply with the orders of the court or understanding of the rules of evidence." *Id.* At that

point defendant gave the brief note to the judge stating his complaints about his attorney.[1]

The court then changed its position and told defendant to write and submit his request during the lunch break, including "your plans for trial, your strategy, *** your general capability of conducting a trial" and stated it would review the request. Defendant reiterated that all he wanted was a "right to call them witnesses." Tr. at 845.

After the lunch break, defense counsel told the court that defendant had given him the "written statement. With the court's permission I will review it with him and we can attach it to the record tomorrow morning." The court instructed counsel to remind it about the letter before trial began in the morning. The court then proceeded with the cross-examination of one of the detectives.

The next morning counsel informed the court that he had the letter the court had instructed defendant to write. The court responded, "Well, I have the first letter he sent. Is there another letter?" The court was informed that the letter in discussion was the one he instructed defendant to write during the previous day's lunch break. The court responded, "[w]ell, send it up when you find it.[2] That's all. ***"

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[1] The note states, "Your Honor, John Moore would like to go on record to preserve right to call back any or all witnesses called by Prosecutor. I have many, many Q's that I presented to my lawyer to ask but did not. I also want Fred King and all co-defendants called if prosecutor doesn't. I also ask that Det. Moran be kept out of court since he'll be called as a witness."

[2] The letter from defendant stated:

CR392440 CA 78751

Your Honor,
I feel that a lot of my Q's would have promoted facts to my defense of being coerced into making a false confession/statement. A lot of relevant information which could contrast with the states (*sic*) position are not being brought out due to the Q's not being asked or line of Qing not being followed through to the end.

I believe by asking former witnesses, the fact that a lot of information can be brought to light thru asking the revelavant [*sic*] Q. Q's to ascertain state of mind of witnesses, intent of witness's and the igsistance [*sic*] of a concerted effort on the police behalf to hid [*sic*] facts and distort truth's [sic]. I have given numerous lead's [*sic*] for Mr. Tobik to follow-up on but none were done in a timely fashion to be used in my defense.

As for closing Arguements [*sic*] if you will give me the perameters [*sic*] [boundries] by which I have to limit my resessatations [*sic*] & statements of fact I'm sure with a reasonable amount of time (48 hrs.) I could write a full assessment of my strategy as well as the means to deliver it to the jury. In closing I have tried to comply with all orders of the court and only wish to get both the truth (in full) and my version of events related to the jury before deliberations commence. I feel that I am in a position to watch but not participate, to witness but not contribute even though I have firsthand knowledge ofentime [*sic*] procedings [*sic*]. I'm if I may put it in example. [*sic*] Being expected to fight a championship boxer in a title fight with my left hand tied & my right broken. I could still fight but the chances of success is [*sic*] zero to none.

I would like to assist Bob Tobik to the best of my abilities and on important matters of strategy & fact toward witnesses & evidence. But if my contributions will be continueously [*sic*] ignored then I would ask that you allow him to assist me in continueing [*sic*] my defense. If that can not be accomplished, I ask that you recall past witneses and they be asked Q's I deem relevant and future witnesses & evidence be reviewed to help better form defense. If none of the before mentioned requests can be granted I ask that you read this entire document into the record and you allow me to proceed pro-se [sic] after a

The court accepted the letter and then ordered the jury into the room. The defense then began its case, calling the defendant as a witness.

Later that day while at a side bar, the court stated "while we're at the side bar, we have – whatever you think is necessary in this defense. I have a letter from him in which he vacillates [*sic*] the letter given to me a minute ago." The court then

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reasonable continuance (48 hrs) for sole purpose of reviewing documents in Prosecutor's control and to formulate a full encompassing strategy & to write both closing arguement [*sic*] and formulate Q's to be asked to me when I take [the] witness stand in my defense. This time will also be used to familiarize myself with the rules, protocols, and procedures of trial. My final request is that this document not be scrutinized by prosecution until such time as I am prepared to act in my own defense. I apologize for any inappropriate behavior in the courtroom and will continue to conduct myself in a respectful manner for the duration of trial.

Thank you
John C. Moore
Sept. 14, 2000 1:00 p.m.
Thursday Written on direction
of judge Honorable Timothy McGinty.

P.S. on pg. # 3

I also request that I be allowed to apologize to [the] jury and they be made fully aware of why the earlier incident took place and the resolution [was] decided and why.

Sincerely
John C. Moore

P.S. II
This should in no way reflect negatively on Mr. Robert Tobik who I hold in high regard and respect immensely. I just feel my defense should be handled a little differently and since the eventual outcome will impact me the most that I should have input into strategy & decision making [it] part of my defense.

states that defendant "doesn't specifically ask to take over his own defense." Defense attorney contradicts the court saying he thinks that the defendant does want to take over his own defense. The court responds, "He wants to and he later says he would like to go *pro se*, but I'm not sure. He wants to go as cocounsel [*sic*] apparently, but, he got up on the witness stand so I don't know if that's an abandonment of what he just gave me beforehand or what.

Anyway, we will discuss it with him. We told him in the last trial, and I told him in this trial he is allowed – I will give him a chance to make a speech at the end of your examination. If he wants to make a statement outside of what he said, he can ***."

Finally, the court said, "[w]e will inquire of him later on again to see where he is at. I can't make heads or tails from that letter, the combination of the letter and his actions getting up on the witness stand."

During another break in defendant's testimony, the court addressed the defendant on the record while the jury was out of the room. The court said:

> Now, the court received your letter here this morning. I read it after you got on the witness stand, Mr. Moore, and you have asked a couple of things. I'm not sure what you want, but you wanted a chance to address the jury. The court would certainly give you that. You had the chance. Your attorney asked is there anything you wanted to say. You gave your

> statement. This is what you are looking for. Do you want to impress the jury again at the end of this?

Defendant replied that he wished to apologize to the jury and the court for his interruptions. The court reminded him that he would be opening himself up to cross-examination. Defense counsel began to speak, "Your Honor--" but the court interrupted him saying, "[s]o you talk it over and whatever you want to do, that's fine. Okay. Have a nice break here." Nothing further was said about defendant's request.

First we note that to make a case for ineffective assistance of counsel, the defendant must prove that his counsel's performance fell below "an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1989), 42 Ohio St.3d 136, syllabus paragraph two. Herein, this defendant cannot demonstrate any instance of unreasonable representation. Further the defendant did not show that but for his counsel's representation he would have been acquitted. For all of these reasons, all of the defendant's assignments of error, including ineffective assistance of counsel, fail and are hereby overruled. Therefore, unless defendant can show that but for his counsel's representation he would have been acquitted, all of his assignments of error addressing ineffective assistance of counsel will fail.

The action of the new trial court in dismissing defendant's request for new counsel or to proceed *pro se* requires examination, however, because it affects defendant's constitutional rights. In *State v. Deal*

(1969), 17 Ohio St.2d 17, syllabus, the Ohio Supreme Court held that

> [w]here during the course of his trial for a serious crime, an indigent accused questions the effectiveness and adequacy of assigned counsel, by stating that such counsel failed to file seasonably a notice of alibi or to subpoena witnesses in support thereof even though requested to do so by the accused, it is the duty of the trial judge to inquire into the complaint and make such inquiry part of the record. The trial just may then require the trial to proceed with assigned counsel participating if the complaint is not substantiated or is unreasonable.

The court must, however, conduct an inquiry specifically addressing defendant's complaints, making a record of the discussion. "The trial court had a duty to investigate a complaint concerning the effectiveness of counsel and to make its investigation on the record for effective appellate review." *State v. Prater* (1990), 71 Ohio App.3d 78, 82.

The state claims that *Prater* is distinguishable because the defendant in *Prater* made his request before trial began. There is nothing in the case law, however, to state that a defendant must make a request to dismiss his counsel or to proceed *pro se* before trial has begun. Indeed, the Supreme Court of the United States noted that a defendant's right to assistance of counsel "implies a right in the defendant to conduct his own defense, with the assistance at what, after all, is his, not counsel's trial." *Id.* at 174, emphasis in original. Defendant

argued that because his counsel was ignoring his requests for the appearance of witnesses and refused to ask the questions defendant requested he ask, he wanted his counsel dismissed. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Faretta v. California* (1975), 422 U.S. 806, 821.

The state argues further that defendant does not have a right to "hybrid" representation, and that once his attorney began the trial, defendant would no longer be allowed to participate. The state misconstrues defendant's request: defendant was not asking for "hybrid" representation, that is, representation which would allow him to conduct part of his defense and the attorney to continue to conduct part of it.

> Once a *pro se* defe4ndant is given the opportunity and elects to have counsel appear before the court or jury, his complaints concerning counsel's subsequent unsolicited participation lose much of their force. *** Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant **expressly and unambiguously renews his request that standby counsel be silenced.**

McKaskle v. Wiggins (1984), 465 U.S. 168, 183, emphasis added. "It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Faretta v. California* (1975), 422 U.S. 806, 834, citations omitted.

On four separate occasions the trial court discussed with the defendant his dissatisfaction with his counsel. Although defendant told the court in his letter that he wished to proceed *pro se*, he then took the stand and allowed his counsel to conduct direct examination on him. Thus although he requested permission to proceed *pro se* in his letter to the court, he immediately contradicted his request by having his attorney continue to defend him. This "subsequent appearance[] by counsel must be presumed to be defendant's acquiescence ***." *McKaskle* at 183.

The trial court expressed confusion over defendant's request. It failed, however, to properly address defendant's complaint at a time when the defendant could have acted on his own behalf. Although the court technically complied with the requirements of *Deal*, the better course would have been to give the defendant the opportunity to explain his request when he initially raised his complaint about his attorney. By the time the court allowed him to speak his piece on the record, defendant had already testified and essentially waived his request to *pro se*.

Further, defendant's objection to his attorney's tactics related to questions not being asked of the state's witnesses. By the time the court addressed the complaints, the trial was well into the defense phase. Although after writing his letter to the judge defendant never again raised his request to question the state's witnesses, the court's manner n handling his request was less than effective. The far preferable course would have been for the court to address the issue the first time it was raised, inquire of the defense counsel its reason for omitting the requested questions and witnesses, and then determining whether the defendant's requests were substantiated or reasonable. *Deal*, syllabus.

The hearing on the defendant's request need not have been lengthy. Rather, the court only needed to elicit the attorneys statement that the tactics requested by defendant were against his interest, and the court could have properly proceeded with the attorney representing the defendant.

Although we overrule this assignment of error, the trial courts are advised to seriously and properly address defendants' requests to change counsel or proceed *pro se*.

For this third assignment of error, defendant states:

> III. JOHN MOORE WAS DENIED HIS CONSTITUTIONAL RIGHT TO CROSS-EXAMINE THE WITNESSES AGAINST HIM, WHEN THE TRIAL COURT IMPROPERLY OVERRULED HIS REQUEST. UNDER OHIO RULE

OF CRIMINAL PROCEDURE 16(B)(1)(g), TO CROSS-EXAMINE A STATE'S WITNESS WITH MATERIAL INCONSISTENCIES IN HER PRIOR STATEMENT.

Defendant argues that one of the state's witnesses, one of the two women who were tied up with duct tape during the robbery, contradicted herself when she gave testimony at trial which conflicted with the signed statement she gave to the police. He claims that although she never described the second robber in her signed statement, she stated in her testimony that she had.

The court denied defendant's counsel's request to use the witness's statement to impeach her accuracy of recall. Although the defense had reviewed the statement at the close of direct, at which time he saw no inconsistencies, after he began cross-examination, he renewed his request. The court responded,

> Well, first of all, Rule 16, at the conclusion of the direct you can look for material omissions. Now that doesn't say anything in Rule 16 about reapproaching the bench about any inconsistency you may have created during her cross-examination. I don't think that's the theory of the rule.

Tr. at 469. The court added several pages later:

> You had that opportunity for inconsistencies. Now you can't develop an inconsistency and wish to use the statement.
> ***

> You examined her about an omission that wasn't in the statement you read and now you want to come back and talk to her about why it isn't an omission. You could also ask her about Perry's trip to Antarctica.

Id. at 472. When the defense again renewed its request to use the witness's statement to impeach her, the court said, "I'm not expanding Rule 16 to where it's never been before." Tr. at 493.

Crim.R. 16(B)(1)(g) states:

> Upon completion of a witness's direct examination at trial, the court on motion of the defendant shall conduct an *in camera* inspection of the witness's written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.
>
> If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.
>
> If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

The court misconstrued the scope of Crim.R. 16(B)(1)(g). In a similar case, this court held in *State v. Ellis* (1975), 46 Ohio App.2d 102, 105:

> [t]he court below clamped the rigid meaning of "immediately" upon the portion of Crim.R. 16(B)(1)(g) which reads, "Upon completion of a witness's direct examination at trial. the court on motion of the defendant shall conduct an in camera inspection ***." Such arctic administration of the right does not comport with the objectives of a just determination. We hold that whether a defendant's inquiry discloses the existence of a witness statement *immediately* upon the completion of the direct examination or *at any other time* during the cross-examination, he is entitled to the benefits of Crim.R. 16(B)(1)(g).

Id. Emphasis in original. This court later restated this principle in *State v. Howell* (Jan. 30, 1997), Cuyahoga App. No. 69805, unreported, 1997 Ohio App. LEXIS 297: "a motion is timely made anytime after completion of direct examination prior to completion of cross examination." *Id.* at 4.

The Ohio Supreme Court has also held that the motion under Crim.R. 16(B)(1)(g) "can be made any time after the completion of the witness's direct examination, but prior to the completion of the witness's cross-examination." *State v. Schnipper* (1986), 22 Ohio St.3d 158, 159-160.

The trial court's error is harmless, however, because an examination of the record and the witness's statement shows no inconsistency. The witness's signed statement contains a description of the first robber, but no description of the second one. In her testimony, she stated that she did not remember if her statement contained a description of

the second robber. The witness had no control over which part of her oral description was transcribed by the police for her signature. She only stated that she gave the police a description, not that the description was contained in her statement. On the witness stand, she reiterated her recollections of her conversation with the police "[t]o the best of [her] knowledge." Tr. at 468. She never claimed that her written statement contained a description of the second robber, so the defense had nothing to use to impeach her.

Had the trial court honored the defense's request for its review of the statement, the court would have been able to deny the defense's request for a repeat view of the statement because no inconsistency existed.

Because no inconsistency existed between the witness's statement and her testimony, the third assignment of error is overruled.

For his fourth assignment of error, defendant states,

> IV. JOHN MOORE HAS BEEN DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW BY HIS SENTENCES, AS SAID SENTENCES DO NOT COMPORT WITH OHIO'S NEW SENTENCING LAWS.

The trial court sentenced defendant to ten years on the aggravated robbery charge, ten years each for the two kidnaping charges, and three years on each gun count. "The gun counts will run

concurrent, but consecutive to all other counts. All sentences of ten years will run consecutive for a total of thirty-three years ***." Tr. at 1229. Defendant claims that the court failed to state the necessary findings and reasons for giving the maximum and consecutive sentences as required by statute. Before it can reverse the sentencing decision of the trial court, this court must find that the trial court has erred by clear and convincing evidence. *State v. Gonzalez* (Mar. 15, 2001), Cuyahoga App. No. 77338, unreported, 2001 Ohio App. LEXIS 1185.

In order to impose the maximum sentence on a defendant, the trial court must make the findings found in R.C. 2929.14(C), which states:

> Except as provided in division (G) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

Additionally, when imposing the maximum sentence, the trial court must fulfill the requirements of 2929.19(B)(2)(e), which states:

> (e) If the sentence is for two or more offenses arising out of a single incident and it imposes

> a prison term for those offenses that is the maximum prison term allowed for the offense of the highest degree by division (A) of section 2929.14 of the Revised Code, its reasons for imposing the maximum prison term.

At the sentencing hearing, the trial court stated that defendant "is a sociopath borderline psychopath individual who is in [*sic*] extreme danger to this community." Tr. at 1227. The court also noted that

> [t]his will be the first individual that I sentence in the millennium to the maximum sentence, but the danger that he poses to the community, the likelihood of repetition, is so great of repeat violent acts, of repeat violent offender, that this Court's duty is to sentence him to the maximum consecutive sentences. It would be an affront to the community, to the statute, it would demean and diminish all aspects of the law not to, and the Court will fulfill its duty ***.

Tr. at 1228-1229.

The court fulfilled the requirement of R.C. 2929.14(C) by finding that the defendant posed a great likelihood of repetition of crime, *i.e.*, recidivism. The court also stated its reason for giving the maximum sentence: "[i]t would be an affront to the community *** [and] would demean and diminish all aspects of the law not to" give the maximum consecutive sentence. Tr. at 1229. The trial court therefore has fulfilled the statutory requirements in giving the defendant the maximum sentence.

Defendant also complains that the trial court failed to make the necessary findings and give the required reasons when it sentenced him to consecutive sentences. When the court imposes consecutive sentences, it must look to R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c).

R.C. 2929.19(B)(2)(c) states:

> (c) If it imposes consecutive sentences under section 2929.14 of the Revised Code, its reasons for imposing the consecutive sentences ***.

R.C. 2929.14 (E)(4) states:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> > (a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
> >
> > (b) The harm caused by the multiple offenses was so great or unusual that no

> single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the of fender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

When sentencing the defendant, the court found that he posed a danger to the community and was very likely to commit further violent acts. The first prong of the three-part test was therefore fulfilled: the sentence was imposed to protect the public from future harm.

The next prong has two requirements. First, the court must find that the sentence is not disproportionate to the seriousness of the offender's conduct. Earlier in the sentencing hearing, the court stated that the offender put "people's lives at risk and [defendant didn't] care about it." Tr. at 1223. The court told the defendant, "you're a totally callous individual with no concern for any other human life except your own." *Id.* The court did not, however, state that when it imposed the consecutive sentences that they were not disproportionate to the offense. Although he stated that not to impose consecutive sentences "would be an affront to the community, to the statute, it would demean and diminish all aspects of the law not to ***." *Id.* He made these comments when discussing potential future crimes of defendant, not when discussing the crime for which

defendant was being sentenced. The court failed, therefore, to make the requisite finding that consecutive sentences were not disproportionate to the seriousness of the offense.

Because the trial court failed to find that consecutive sentences were not disproportionate to the offense, this case must be remanded for resentencing.

Defendant also states four supplemental assignments of error.

For his first supplemental assignment of error, he states:

> I. JOHN MOORE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN. THE TRIAL COURT TOOK NO ACTION FOLLOWING MR. MOORE'S ALLEGATIONS THAT A POLICE OFFICER WAS SIGNALING DESIRED RESPONSES TO A STATE'S WITNESS.

After dismissing the jury following the state's witness's testimony, the court addressed the defendant:

> Mr. Moore, we had some actions here which suggest you are trying to control the manner in which this court is run. If you want to communicate to your attorney -- at the conclusion of every witness, he talks to you. You can't interrupt to tell him what to do, get over there. That is highly disrespectful to your attorney, number one. It is disruptive of

> the court proceedings and you're not running the show here, Mr. Moore.

Tr. at 502. Defendant's attorney tried to explain defendant's behavior to the court, stating that defendant was trying to notify him that "[s]omeone at the State's table was shaking their head while I was asking the witness a question. And that's why he was upset because someone here was giving a signal or doing some gesture." *Id.* at 503. When the court responded, "I don't know if that happened. I didn't observe that. If that happens, you can approach the court and ask that it be stopped. The defendant isn't in that position." The attorney explained, "[h]e saw I didn't see it and he called me over so I would take note of it." *Id.*

Defendant now argues that the witness coaching in question was detrimental to his case. The witness in question was asked if she had seen a picture of the defendant on television, to which she replied no. Defendant claims that the detective at the trial table was shaking his head no when she was asked this question. Defendant states that her identification of him is seminal to his conviction and that if she had seen his picture on television, her identification of him might be tainted.

Unfortunately, the defense was not able to bring this alleged witness coaching to the court's attention until after the completion of testimony. The court stated that it did not observe any coaching, which leaves a situation of the court's word against the defendant's.

If the court is made aware of alleged coaching, it should caution the party doing the coaching or move the party out of the witness's line of sight. *State v. Glass* (Jan 15, 1981), Cuyahoga App. No. 42392; 42203, unreported, 1981 Ohio App. LEXIS 11598; *State v. Washington* (Aug. 17, 2001), Hamilton App. No. C-000754, unreported, 2001 Ohio App. LEXIS 3604.

"It is well-settled law that a reviewing court may not reverse a trial court's rulings as to the examination of witnesses and the conduct of counsel absent a showing of abuse of discretion. *** Further, any error in the handling of an alleged coaching of a witness requires a showing of prejudice in order to constitute reversible error." *State v. Barton* (Feb. 14, 1992), Lucas App. No. L-90-344, unreported, 1992 Ohio App. LEXIS 552, at *5. Thus the defendant must "provide some evidence either that the misconduct was 'so egregious and inimical to the concept of a fair trial' that it could not be disregarded within the trial judge's discretion *** or that the coaching was actually the primary source of testimony that had a reasonable probability of affecting the trial result." *State v. Linehan* (Sept. 4, 1998), Montgomery App. No. 16841, unreported, 1998 Ohio App. LEXIS 4134, unreported, at *21, citations omitted.

The witness who was allegedly coached was not the only witness to identify the defendant. Further, the defendant's confession was read into evidence. Although defendant took the stand and recanted his confession, arguing that it was coerced, there was more than adequate evidence for the jury

to find beyond a reasonable doubt that defendant was guilty, even without the identification by this particular witness.

The first supplemental assignment of error is overruled.

For his second assignment of error, defendant states:

> II. JOHN MOORE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, WHEN A POLICE OFFICER INTRODUCED HEARSAY EVIDENCE BY READING FROM A POLICE REPORT.

Defendant argues that much of the testimony of one of the detectives is hearsay because the detective read from statements of the co-defendants. The defense made no objection to this testimony, so the review is under the plain error standard.

Defendant particularly objected to the use of the statement of the co-defendant who actually performed the robbery inside the Hard Rock Cafe. The state counters that because this co-defendant .refused to testify, pleading the Fifth Amendment, he was unavailable and therefore his "statement was permissible because it was a statement against penal interest and therefore a recognized exception to the hearsay rule." Appellee's supplemental brief at 3.

Evid.R. 804 (B)(3) states:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> ***
> A statement that was at the time of its making so far contrary to the declarant's *** interest, or so far tended to subject the declarant to civil or criminal liability *** that a reasonable person in the declarant's position 'would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The Ohio Supreme Court adopted the ruling of the United States Supreme Court in *Lilly v. Virginia* (1999), 527 U.S. 119 in *State v. Madgrigal* (2000), 87 Ohio St. 3d 378, noting the Court's holding that such statements are considered unreliable unless "they exhibit a guarantee of trustworthiness or indicia of reliability." *Madrigal* at 386. Further, this reliability and trustworthiness cannot come from corroborating evidence presented at trial; rather, [t]he circumstantial guarantees of trustworthiness are those that exist at the time the statement was made and do not include those that may be added using hindsight." *Id.* at 387, citations omitted.

If the hearsay statement does not have the requisite y trustworthiness, then "the final inquiry is whether the Sixth Amendment error was 'harmless beyond a reasonable doubt.' This inquiry is not

simply a sufficiency of the remaining evidence inquiry; rather, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 388, citations omitted.

The detective's complained of testimony also showed that most of the information received by the co-defendant declarant was unreliable. The detective stated that they followed a number of leads given to them by the declarant, all of which proved to be useless. Certainly any statement made by the declarant at this time cannot be given an indicia of reliability.

Because the statement admitted was not admissible under the hearsay exception, we must examine whether its admission "might have contributed to the conviction." *Madrigal* at 388. Much of the complained of testimony was confusing and merely served to demonstrate the fact that the declarant refused to tell the truth or help the police. The fact that the declarant saw a picture of defendant and stated, "that's Bunkie" does not implicate defendant, when copious evidence showed that defendant had not gone by the alias of "Bunkie" and that a search of the police computers did not reveal defendant's identity under this alias. The declarant who identified defendant as "Bunkie" also told the police to search for him in two neighborhoods which defendant did not frequent.

The declarant's statements, although inadmissible hearsay, cannot be said to have contributed to defendant's conviction. In fact, the red herrings thrown out by the declarant' would

more likely have led the police away from, rather than toward, defendant.

The second supplemental assignment of error is overruled.

For his third supplemental assignment of error, defendant states,

> III. JOHN MOORE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL COURT REFUSED TO GRANT A REASONABLE CONTINUANCE, SO THAT COUNSEL COULD PREPARE ADEQUATELY FOR THE TRIAL.

Two days prior to the beginning of defendant's trial, the transcript of one of his co-defendants became available. Defendant moved for a continuance of trial to allow his counsel to review the transcript for inconsistent statements made by witnesses in both trials. The court refused to grant the continuance, and defendant now argues that his defense was prejudiced by this refusal.

"The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there had been an abuse of discretion." *State v. Unger* (1981), 67 Ohio St.2d 65, 67. Determining whether a denial of a continuance is arbitrary is dependant on the circumstances of each individual case. *Id.* The court has the right to weigh the needs of its own

docket against the potential prejudice to which defendant may be exposed. *Id.*

Several factors must be examined in determining whether a grant of a continuance is required:

> The length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending upon the unique facts of each case.

Unger at 67-68.

The only reasons given for the motion for continuance were, "[t]ranscripts were received by defendants counsel late afternoon September 8, 2000. A thorough review of these transcripts, prior to commencement of trial, is essential to the effective representation of the defendant." Defendant's motion also mentions a fingerprint match of the defendant, but that issue was not argued at trial.

Applying the *Unger* criteria, we note that defendant did not state a time period requested in his motion. The record does not reflect any previous requests for continuance, and as defendant pointed out in his appellate brief, all the witnesses were needed to testify in subsequent trials of co-defendants, and would not be inconvenienced by a

continuance. The reason for requesting the delay appears to be sincere; however, as the state pointed out in its appellate brief, counsel had two days and following evenings to review the testimony of witnesses who would be appearing before him at defendant's trial.

Given that the trial court's schedule is set well in advance and the court had undoubtedly set aside a significant block of time for this trial, and given that the transcript of a co-defendant's trial would not have been available to defendant but for the vagaries of scheduling which placed the co-defendant's trial first, he do not find error in the trial court's denial of defendant's motion for continuance.

The third supplemental assignment of error is overruled.

For his fourth supplemental assignment of error, defendant states,

> III. JOHN MOORE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WHEN COUNSEL BOTH FAILED TO FILE AN AFFIDAVIT OF PREJUDICE AGAINST THE JUDGE PRESIDING OVER HIS TRIAL WITH THE CUYAHOGA COUNTY COURT OF COMMON PLEAS AND WHEN COUNSEL FAILED TO PRESERVE THE RECORD AND DENIED MR. MOORE OF AN OTHERWISE VALID APPELLATE ISSUE.

The same trial judge had presided over at least one trial of a co-defendant in this robbery. In the former trial, the court had had to admonish defendant concerning his behavior on the witness stand. Also, when ruling on defendant's Crim.R. 16 motion, the court referenced the fact that he was familiar with the evidence "[b]ecause I've seen the police reports in the last trial and I 'know." Tr. at 493. At that point defense counsel stated that the judge "shouldn't be sitting on this case if you heard this stuff from the last trial." *Id.* The judge then denied that his familiarity with the case was affecting him in the case at bar. No further discussion was had concerning the propriety of the judge presiding.

Defendant now argues that his counsel should have filed an affidavit of disqualification of the judge. Counsel had filed a motion for recusal, but did not file a subsequent affidavit when the motion was denied.

"R.C. 2701.03 allows a party to file an affidavit of disqualification with [the Ohio Supreme Court] when a common pleas judge is allegedly biased against a party or counsel." *State v. Getsy* (1998), 84 Ohio St.3d 180, 185. Additionally,

> [a] judge need not recuse himself simply because he acquired knowledge of the facts during a prior proceeding. *** Even if [the trial judge] formed an opinion of Espinoza's veracity based on his earlier testimony at Keenan's trial, such an opinion does not disqualify the judge from this case. '[W]hat a judge learns in his judicial capacity - - whether

> by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both - - is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification.' *** Since 'evidence presented in the trial of a prior cause *** do[es] not stem from an extrajudicial source' it creates no personal bias requiring recusal.

State v. D'Ambrosio (1993), 67 Ohio St.3d 185, 188. See, also, *State v. Cornwell* (1997), 81 Ohio St. 3d 1205.

Defendant argues that the trial court "showed instances in which the trial court displayed its anger -- even dislike – for" defendant. Supplemental appellate brief at 9. Although the court did display irritation with the defendant, it also showed concern for the fairness of defendant's trial, as exhibited by several side bar discussions with counsel. Further, the instances in which the court was irritated with defendant occurred when defendant disrupted the court.

Defendant also claims that the court displayed dislike for the defendant. This is a subjective impression, and does not take into consideration the individual manners of expression of those who occupy the bench. In sum, defendant fails to demonstrate that because it conducted the trial of a co-defendant, the court was not able to be objective and fair in his trial.

The fourth assignment of error is overruled.

The judgment of conviction is affirmed. The imposition of consecutive sentences is reversed and remanded for resentencing.

Conviction affirmed; reversed and remanded for further 'proceedings consistent with the opinion herein.

It is, therefore, ordered that appellant recover from appellee costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

s/Timothy E. McMonagle
Administrative Judge

Received: April 18, 2002

Filed and Journalized: April 29, 2002

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's

announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, section 2 (A)(1).